UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	:	**FINAL JURY CHARGE**
-against-	:	**14-CR-399 (S-1) (ENV)**
ABRAXAS DISCALA AND KYLEEN CANE,	:	
Defendants.	:	

VITALIANO, D.J.

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PART I: GENERAL RULES

PRELIMINARY INSTRUCTIONS

MEMBERS OF THE JURY, NOW THAT THE EVIDENCE IN THIS CASE HAS BEEN PRESENTED AND THE ATTORNEYS FOR THE GOVERNMENT AND EACH DEFENDANT HAS CONCLUDED THEIR CLOSING ARGUMENTS, IT IS MY RESPONSIBILITY TO INSTRUCT YOU AS TO THE LAW THAT GOVERNS THIS CASE. BEFORE I DO SO, I WANT TO THANK YOU FOR YOUR PATIENCE AND COOPERATION.

MY INSTRUCTIONS WILL BE IN THREE PARTS:

FIRST: I WILL INSTRUCT YOU REGARDING THE GENERAL RULES THAT DEFINE AND GOVERN THE DUTIES OF A JURY IN A CRIMINAL CASE;

SECOND: I WILL INSTRUCT YOU AS TO THE LEGAL ELEMENTS OF THE CRIMES CHARGED IN THE INDICTMENT, THAT IS, THE SPECIFIC ELEMENTS THAT THE GOVERNMENT MUST PROVE BEYOND A REASONABLE DOUBT TO WARRANT A FINDING OF GUILT; AND

THIRD: I WILL GIVE YOU SOME GENERAL RULES REGARDING YOUR DELIBERATIONS.

THE DUTIES OF THE JURY

YOU HAVE NOW HEARD ALL OF THE EVIDENCE IN THE CASE AS WELL AS THE FINAL ARGUMENTS OF THE LAWYERS FOR THE PARTIES.

IT IS YOUR DUTY TO FIND THE FACTS FROM ALL THE EVIDENCE IN THIS CASE. YOU ARE THE SOLE JUDGES OF THE FACTS, AND IT IS, THEREFORE, FOR YOU AND YOU ALONE TO PASS UPON THE WEIGHT OF THE EVIDENCE; TO RESOLVE SUCH CONFLICTS AS MAY HAVE APPEARED IN THE EVIDENCE; AND TO DRAW SUCH INFERENCES AS YOU DEEM TO BE REASONABLE AND WARRANTED FROM THE EVIDENCE OR LACK OF EVIDENCE IN THIS CASE.

WITH RESPECT TO ANY QUESTION CONCERNING THE FACTS, IT IS YOUR RECOLLECTION OF THE EVIDENCE

THAT CONTROLS.

TO THE FACTS AS YOU FIND THEM, YOU MUST APPLY THE LAW IN ACCORDANCE WITH MY INSTRUCTIONS. WHILE THE LAWYERS MAY HAVE COMMENTED ON SOME OF THESE LEGAL RULES, YOU MUST BE GUIDED ONLY BY WHAT I INSTRUCT YOU ABOUT THEM. YOU MUST FOLLOW ALL THE RULES AS I EXPLAIN THEM TO YOU. YOU MAY NOT FOLLOW SOME AND IGNORE OTHERS; EVEN IF YOU DISAGREE WITH OR DO NOT UNDERSTAND THE REASONS FOR SOME OF THE RULES, YOU ARE BOUND TO FOLLOW THEM.

I EXPRESS NO VIEW WHETHER A DEFENDANT IS GUILTY OR NOT GUILTY OR AS TO ANY FACT. YOU SHOULD NOT DRAW ANY INFERENCE OR REACH ANY

CONCLUSION AS TO WHETHER A DEFENDANT IS GUILTY OR NOT GUILTY FROM ANYTHING I MAY HAVE SAID OR DONE. YOU WILL DECIDE THE CASE SOLELY ON THE FACTS YOU FIND AND THE LAW AS I GIVE IT TO YOU.

PARTIES ARE EQUAL BEFORE THE COURT

IN REACHING YOUR VERDICT, YOU ARE TO PERFORM THE DUTY OF FINDING THE FACTS WITHOUT BIAS OR PREJUDICE AS TO ANY PARTY. YOU MUST REMEMBER THAT ALL PARTIES STAND EQUAL BEFORE A JURY IN THE COURTS OF THE UNITED STATES. THE FACT THAT THE GOVERNMENT IS A PARTY AND THE PROSECUTION IS BROUGHT IN THE NAME OF THE UNITED STATES DOES NOT ENTITLE THE GOVERNMENT OR ITS WITNESSES TO ANY GREATER CONSIDERATION THAN THAT ACCORDED TO ANY OTHER PARTY. BY THE SAME TOKEN, YOU MUST GIVE IT NO LESS CONSIDERATION. YOUR VERDICT MUST BE BASED SOLELY ON THE EVIDENCE OR LACK OF EVIDENCE.

FOR THE SAME REASONS, THE PERSONALITIES AND THE CONDUCT OF COUNSEL ARE NOT IN ANY WAY IN ISSUE. IF YOU FORMED REACTIONS OF ANY KIND TO ANY OF THE LAWYERS IN THE CASE, FAVORABLE OR UNFAVORABLE, WHETHER YOU APPROVED OR DISAPPROVED OF THEIR BEHAVIOR, THOSE REACTIONS MUST NOT ENTER INTO YOUR DELIBERATIONS.

DURING THE COURSE OF THE TRIAL, I MAY HAVE ADMONISHED AN ATTORNEY. YOU SHOULD DRAW NO INFERENCE AGAINST THE ATTORNEY OR THE CLIENT. IT IS THE DUTY OF THE ATTORNEYS TO OFFER EVIDENCE AND PRESS OBJECTIONS ON BEHALF OF THEIR SIDE. IT IS MY FUNCTION TO CUT OFF COUNSEL FROM AN IMPROPER LINE OF ARGUMENT OR QUESTIONING, AND

TO STRIKE ANSWERS WHEN I THINK IT IS NECESSARY.

BUT YOU SHOULD DRAW NO INFERENCE FROM THAT.

PRESUMPTION OF INNOCENCE

THE INDICTMENT THAT WAS FILED AGAINST THE DEFENDANTS IS THE MEANS BY WHICH THE GOVERNMENT GIVES THE DEFENDANTS NOTICE OF THE CHARGES AGAINST THEM AND BRINGS THEM BEFORE THE COURT. THE INDICTMENT IS AN ACCUSATION AND NOTHING MORE. THE INDICTMENT IS NOT EVIDENCE AND YOU ARE TO GIVE IT NO WEIGHT IN ARRIVING AT YOUR VERDICT.

THE DEFENDANTS, IN RESPONSE TO THE INDICTMENT, PLEADED "NOT GUILTY." A DEFENDANT IS PRESUMED TO BE INNOCENT UNLESS HIS OR HER GUILT HAS BEEN PROVEN BEYOND A REASONABLE DOUBT, AND THAT PRESUMPTION ALONE, UNLESS OVERCOME, IS

SUFFICIENT TO ACQUIT HIM OR HER. EACH DEFENDANT IS ON TRIAL FOR THE CRIMES CHARGED AGAINST HIM AND HER IN THE INDICTMENT AND NOT FOR ANYTHING ELSE.

BURDEN OF PROOF

THE GOVERNMENT HAS THE BURDEN – THAT IS, THE OBLIGATION – OF PROVING GUILT BEYOND A REASONABLE DOUBT. THIS BURDEN NEVER SHIFTS TO A DEFENDANT. A DEFENDANT DOES NOT HAVE TO PROVE HIS OR HER INNOCENCE; HE OR SHE NEED NOT SUBMIT ANY EVIDENCE AT ALL.

REASONABLE DOUBT

SINCE, IN ORDER TO CONVICT A DEFENDANT OF A GIVEN CHARGE, THE GOVERNMENT IS REQUIRED TO PROVE THAT CHARGE BEYOND A REASONABLE DOUBT, THE QUESTION THEN IS: WHAT IS REASONABLE DOUBT? THE WORDS ALMOST DEFINE THEMSELVES. IT IS A DOUBT BASED UPON REASON. IT IS A DOUBT THAT A REASONABLE PERSON HAS AFTER CAREFULLY WEIGHING ALL OF THE EVIDENCE OR LACK OF EVIDENCE. IT IS A DOUBT THAT WOULD CAUSE A REASONABLE PERSON TO HESITATE TO ACT IN A MATTER OF IMPORTANCE IN HIS OR HER PERSONAL LIFE. PROOF BEYOND A REASONABLE DOUBT MUST, THEREFORE, BE PROOF OF A CONVINCING CHARACTER

THAT A REASONABLE PERSON WOULD NOT HESITATE TO RELY UPON IN MAKING AN IMPORTANT DECISION.

A REASONABLE DOUBT IS NOT CAPRICE OR WHIM. IT IS NOT SPECULATION OR SUSPICION. IT IS NOT AN EXCUSE TO AVOID THE PERFORMANCE OF AN UNPLEASANT DUTY. THE LAW DOES NOT REQUIRE THAT THE GOVERNMENT PROVE GUILT BEYOND ALL POSSIBLE DOUBT: PROOF BEYOND A REASONABLE DOUBT IS SUFFICIENT TO CONVICT.

IF, AFTER FAIR AND IMPARTIAL CONSIDERATION OF THE EVIDENCE, YOU HAVE A REASONABLE DOUBT AS TO A DEFENDANT'S GUILT WITH RESPECT TO A PARTICULAR CHARGE AGAINST HIM OR HER, YOU MUST FIND THAT DEFENDANT NOT GUILTY OF THAT CHARGE. ON THE

OTHER HAND, IF AFTER FAIR AND IMPARTIAL CONSIDERATION OF ALL THE EVIDENCE, YOU ARE SATISFIED BEYOND A REASONABLE DOUBT OF A DEFENDANT'S GUILT WITH RESPECT TO A PARTICULAR CHARGE AGAINST HIM OR HER, YOU SHOULD FIND THAT DEFENDANT GUILTY OF THAT CHARGE.

EVIDENCE GENERALLY

I WISH TO EXPAND NOW ON THE INSTRUCTIONS I GAVE YOU AT THE BEGINNING OF THE TRIAL AS TO WHAT IS EVIDENCE AND HOW YOU SHOULD CONSIDER IT. EVIDENCE COMES IN SEVERAL FORMS, INCLUDING:

A. SWORN TESTIMONY OF WITNESSES, BOTH ON DIRECT AND CROSS-EXAMINATION, AND REGARDLESS OF WHO CALLED THE WITNESS;

B. EXHIBITS THAT HAVE BEEN RECEIVED IN EVIDENCE BY THE COURT; AND

C. FACTS TO WHICH ALL THE LAWYERS HAVE AGREED OR STIPULATED.

STIPULATIONS

THE PARTIES HAVE STIPULATED TO CERTAIN FACTS IN THIS CASE. SUCH A STIPULATION IS AN AGREEMENT AMONG THE PARTIES THAT A CERTAIN FACT IS TRUE. YOU MUST CONSIDER SUCH STIPULATED FACTS AS TRUE.

WHAT IS NOT EVIDENCE

CERTAIN THINGS ARE NOT EVIDENCE AND ARE TO BE DISREGARDED BY YOU IN DECIDING WHAT THE FACTS ARE. THEY ARE AS FOLLOWS:

FIRST, ARGUMENTS OR STATEMENTS BY LAWYERS ARE NOT EVIDENCE.

QUESTIONS PUT TO THE WITNESSES ARE NOT EVIDENCE. IT IS THE QUESTION COMBINED WITH THE ANSWER THAT IS EVIDENCE.

IN ADDITION TO THE LAWYERS' QUESTIONS, I OCCASIONALLY MAY HAVE ASKED QUESTIONS FOR PURPOSES OF CLARIFICATION. PLEASE DO NOT ASSUME THAT THE QUESTIONS ARE EVIDENCE OR THAT I HOLD ANY OPINION ON THE MATTERS TO WHICH ANY

QUESTIONS MAY HAVE RELATED. I DO NOT. THOSE QUESTIONS WERE ASKED SOLELY IN AN EFFORT OR ATTEMPT TO MAKE SOMETHING CLEARER.

SIMILARLY, OBJECTIONS TO QUESTIONS OR TO OFFERED EXHIBITS ARE NOT EVIDENCE. IN THIS REGARD, ATTORNEYS HAVE A DUTY TO THEIR CLIENTS TO OBJECT WHEN THEY BELIEVE EVIDENCE SHOULD NOT BE RECEIVED. YOU SHOULD NOT BE INFLUENCED BY THE OBJECTION OR BY THE COURT'S RULING ON IT. IF THE OBJECTION WAS SUSTAINED, IGNORE THE QUESTION. IF THE OBJECTION WAS OVERRULED, TREAT THE ANSWER LIKE ANY OTHER ANSWER.

OF COURSE, TESTIMONY THAT HAS BEEN STRICKEN OR THAT YOU HAVE BEEN INSTRUCTED TO DISREGARD IS

NOT EVIDENCE, AND MUST BE DISREGARDED.

EQUALLY OBVIOUS, ANYTHING YOU MAY HAVE SEEN OR HEARD OUTSIDE THE COURTROOM IS NOT EVIDENCE.

FINALLY, IT WOULD BE IMPROPER FOR YOU TO CONSIDER, IN REACHING YOUR DECISION AS TO WHETHER THE GOVERNMENT SUSTAINED ITS BURDEN OF PROOF, ANY PERSONAL FEELINGS YOU MAY HAVE ABOUT A DEFENDANT'S RACE, RELIGION, NATIONAL ORIGIN, ETHNIC BACKGROUND, SEX, OR AGE. ALL PERSONS ARE ENTITLED TO THE PRESUMPTION OF INNOCENCE AND THE GOVERNMENT HAS THE SAME BURDEN OF PROOF. IN ADDITION, IT WOULD BE EQUALLY IMPROPER FOR YOU TO ALLOW ANY FEELINGS YOU MIGHT HAVE ABOUT THE GOVERNMENT OF THE UNITED STATES OR THE

NATURE OF THE CRIME CHARGED TO INTERFERE WITH YOUR DECISION-MAKING PROCESS.

TO REPEAT, YOUR VERDICT MUST BE BASED EXCLUSIVELY UPON THE EVIDENCE OR THE LACK OF EVIDENCE IN THE CASE.

WIRETAPS AND TRANSCRIPTS

THE GOVERNMENT HAS OFFERED EVIDENCE IN THE FORM OF RECORDINGS OF TELEPHONE CALLS AND TRANSMITTED TEXT MESSAGES INVOLVING THE DEFENDANTS. SOME OF THOSE WERE OBTAINED WITHOUT THE KNOWLEDGE OF THE PARTIES TO THESE COMMUNICATIONS, BUT WITH THE CONSENT AND AUTHORIZATION OF THE COURT OF THE EASTERN DISTRICT OF NEW YORK. THESE SO CALLED WIRETAPS WERE LAWFULLY OBTAINED. THE USE OF THIS PROCEDURE TO GATHER EVIDENCE IS PERFECTLY LAWFUL AND THE GOVERNMENT HAS THE RIGHT TO USE SUCH "WIRETAPS" IN THIS CASE.

WITH RESPECT TO THESE RECORDINGS, THE GOVERNMENT WAS PERMITTED TO PROVIDE TRANSCRIPTS CONTAINING ITS INTERPRETATION OF WHAT WAS SAID ON ENGLISH LANGUAGE RECORDINGS THAT WERE RECEIVED INTO EVIDENCE. THE TRANSCRIPTS WERE PROVIDED TO YOU AS AIDS OR GUIDES TO ASSIST YOU IN LISTENING TO THE RECORDINGS. HOWEVER, THEY ARE NOT, IN AND OF THEMSELVES, EVIDENCE. THEY WERE NOT ADMITTED INTO EVIDENCE. THE RECORDINGS ARE THE PRIMARY AND BEST SOURCE OF EVIDENCE.

WHEN THE RECORDINGS WERE PLAYED, I ADVISED YOU TO LISTEN VERY CAREFULLY TO THE RECORDINGS THEMSELVES. FOR RECORDINGS IN ENGLISH, YOU

SHOULD MAKE YOUR OWN INTERPRETATION OF WHAT APPEARS ON THE RECORDING BASED ON WHAT YOU HEARD. IF YOU THINK YOU HEARD SOMETHING DIFFERENTLY THAN THE WAY IT APPEARED ON THE TRANSCRIPT, WHAT YOU HEARD IS CONTROLLING. YOU, THE JURY, ARE THE SOLE JUDGES OF THE FACTS.

CHARTS AND SUMMARIES – ADMITTED AS EVIDENCE

SOME OF THE EXHIBITS THAT WERE ADMITTED INTO EVIDENCE WERE IN THE FORM OF CHARTS AND SUMMARIES. I DECIDED TO ADMIT THESE CHARTS AND SUMMARIES IN PLACE OF AND, AT TIMES, ALONG WITH THE UNDERLYING DOCUMENTS THAT THEY REPRESENT IN ORDER TO SAVE TIME AND AVOID UNNECESSARY INCONVENIENCE. YOU SHOULD CONSIDER THESE CHARTS AND SUMMARIES AS YOU WOULD ANY OTHER EVIDENCE.

CHARTS AND SUMMARIES (NOT ADMITTED AS EVIDENCE)

(IF APPLICABLE)

DURING THE COURSE OF TRIAL, THERE WERE CERTAIN OTHER CHARTS AND SUMMARIES SHOWN TO YOU IN ORDER TO MAKE THE OTHER EVIDENCE MORE MEANINGFUL AND TO AID YOU IN CONSIDERING THAT EVIDENCE. THEY ARE NOT DIRECT, INDEPENDENT EVIDENCE; THEY ARE SUMMARIES OF THE EVIDENCE. THEY WERE ADMITTED AS AIDS TO YOU.

IT IS FOR YOU TO DECIDE WHETHER THE CHARTS AND SUMMARIES CORRECTLY PRESENT INFORMATION CONTAINED IN THE TESTIMONY AND IN THE EXHIBITS ON WHICH THEY ARE BASED. TO THE EXTENT THAT THE CHARTS CONFORM WITH WHAT YOU DETERMINE THE UNDERLYING EVIDENCE TO BE, YOU MAY CONSIDER THEM IF YOU FIND THAT THEY ARE OF ASSISTANCE TO YOU IN ANALYZING AND UNDERSTANDING THE

EVIDENCE.

DIRECT AND CIRCUMSTANTIAL EVIDENCE

I TOLD YOU THAT EVIDENCE COMES IN VARIOUS FORMS SUCH AS THE SWORN TESTIMONY OF WITNESSES, EXHIBITS, AND STIPULATIONS.

THERE ARE, IN ADDITION, DIFFERENT KINDS OF EVIDENCE -- DIRECT AND CIRCUMSTANTIAL.

DIRECT EVIDENCE IS THE COMMUNICATION OF A FACT BY A WITNESS, WHO TESTIFIED TO THE KNOWLEDGE OF THAT FACT AS HAVING BEEN OBTAINED THROUGH ONE OF THE FIVE SENSES. SO, FOR EXAMPLE, A WITNESS WHO TESTIFIED TO KNOWLEDGE OF A FACT BECAUSE SHE OR HE SAW IT, HEARD IT, SMELLED IT, TASTED IT, OR TOUCHED IT IS GIVING EVIDENCE WHICH IS DIRECT. WHAT REMAINS IS YOUR RESPONSIBILITY TO

PASS UPON THE CREDIBILITY OF THE TESTIMONY THAT WITNESS GAVE.

CIRCUMSTANTIAL EVIDENCE IS EVIDENCE WHICH TENDS TO PROVE A FACT IN ISSUE BY PROOF OF OTHER FACTS FROM WHICH THE FACT IN ISSUE MAY BE INFERRED.

THE WORD "INFER" – OR THE EXPRESSION "TO DRAW AN INFERENCE" -- MEANS TO FIND THAT A FACT EXISTS FROM PROOF OF ANOTHER FACT. FOR EXAMPLE, IF A FACT IN ISSUE IS WHETHER IT IS RAINING AT THE MOMENT, NONE OF US CAN TESTIFY DIRECTLY TO THAT FACT SITTING AS WE ARE IN WHAT IS AN ESSENTIALLY WINDOWLESS COURTROOM. ASSUME, HOWEVER, THAT AS WE ARE SITTING HERE, A PERSON WALKS INTO THE

COURTROOM WEARING A RAINCOAT THAT IS DRIPPING WET AND CARRYING AN UMBRELLA THAT IS DRIPPING WATER. WE MAY INFER FROM THOSE FACTS THAT IT IS RAINING OUTSIDE. IN OTHER WORDS, THE FACT OF RAIN IS AN INFERENCE THAT COULD BE DRAWN FROM THE WET RAINCOAT AND THE DRIPPING UMBRELLA.

HOWEVER, FROM THE DIRECT EVIDENCE OF YOUR OBSERVATION OF A PERSON ENTERING THE COURTROOM WEARING A WET RAINCOAT AND CARRYING A WET UMBRELLA ALONE, YOU COULD NOT INFER EXACTLY WHEN THE RAIN HAD STARTED OR FOR HOW LONG IT HAD RAINED.

AN INFERENCE IS TO BE DRAWN ONLY IF IT IS LOGICAL AND REASONABLE TO DO SO. IN DECIDING

WHETHER TO DRAW AN INFERENCE, YOU MUST LOOK AT AND CONSIDER ALL THE FACTS IN THE LIGHT OF REASON, COMMON SENSE, AND EXPERIENCE. WHETHER A GIVEN INFERENCE IS OR IS NOT TO BE DRAWN IS ENTIRELY A MATTER FOR YOU, THE JURY, TO DECIDE. PLEASE BEAR IN MIND, HOWEVER, THAT AN INFERENCE IS NOT TO BE DRAWN BY GUESSWORK OR SPECULATION.

I REMIND YOU ONCE AGAIN THAT YOU MAY NOT CONVICT A DEFENDANT UNLESS YOU ARE SATISFIED OF HIS OR HER GUILT BEYOND A REASONABLE DOUBT, WHETHER BASED ON DIRECT EVIDENCE, CIRCUMSTANTIAL EVIDENCE, OR THE LOGICAL INFERENCES TO BE DRAWN FROM SUCH EVIDENCE.

CIRCUMSTANTIAL EVIDENCE DOES NOT

NECESSARILY PROVE LESS THAN DIRECT EVIDENCE, NOR DOES IT NECESSARILY PROVE MORE. YOU ARE TO CONSIDER ALL THE EVIDENCE IN THE CASE, DIRECT AND CIRCUMSTANTIAL, IN DETERMINING WHAT THE FACTS ARE AND IN ARRIVING AT YOUR VERDICT.

INFERENCES

I WILL NOW INSTRUCT YOU FURTHER ABOUT INFERENCES. DURING THE TRIAL, YOU MAY HAVE HEARD THE ATTORNEYS USE THE TERM "INFERENCE," AND IN THEIR ARGUMENTS THEY MAY HAVE ASKED YOU TO INFER, ON THE BASIS OF YOUR REASON, EXPERIENCE AND COMMON SENSE, FROM ONE OR MORE PROVEN FACTS, THE EXISTENCE OF SOME OTHER FACTS.

AN INFERENCE IS NOT A SUSPICION OR A GUESS. IT IS A LOGICAL CONCLUSION THAT A DISPUTED FACT EXISTS THAT WE REACH IN LIGHT OF ANOTHER FACT WHICH HAS BEEN SHOWN TO EXIST. THERE ARE TIMES WHEN DIFFERENT INFERENCES MAY BE DRAWN FROM FACTS, WHETHER PROVED BY DIRECT OR

CIRCUMSTANTIAL EVIDENCE. IT IS FOR YOU, AND YOU ALONE, TO DECIDE WHAT INFERENCES YOU WILL DRAW. KEEP IN MIND THAT THE MERE EXISTENCE OF AN INFERENCE AGAINST A DEFENDANT DOES NOT RELIEVE THE GOVERNMENT OF THE BURDEN OF ESTABLISHING ITS CASE BEYOND A REASONABLE DOUBT.

IMPERMISSIBLE TO INFER GUILT FROM ASSOCIATION

IN CONSIDERING INFERENCES, KEEP IN MIND THAT YOU MAY NOT INFER THAT A DEFENDANT IS GUILTY OF CRIMINAL CONDUCT MERELY FROM THE FACT THAT HE OR SHE ASSOCIATED WITH OTHER PEOPLE WHO WERE GUILTY OF WRONGDOING, OR THAT HE OR SHE WAS PRESENT AT THE TIME THAT CRIMINAL CONDUCT WAS BEING COMMITTED, OR THAT HE OR SHE HAD KNOWLEDGE THAT IT WAS BEING COMMITTED.

NUMBER OF WITNESSES

AND UNCONTRADICTED TESTIMONY

THE FACT THAT ONE SIDE OR THE OTHER CALLED MORE WITNESSES OR INTRODUCED MORE EVIDENCE DOES NOT MEAN THAT YOU SHOULD FIND THE FACTS IN FAVOR OF THE SIDE WHO CALLED MORE WITNESSES. YOU MUST NOT PERMIT THE NUMBER OF WITNESSES OR DOCUMENTS SUPPLIED OR THE AMOUNT OF TIME TAKEN IN EXAMINING A WITNESS TO OVERWHELM YOUR JUDGMENT. THE WEIGHT OF THE EVIDENCE IS BY NO MEANS DETERMINED BY THE NUMBER OF WITNESSES OR THE LENGTH OF THEIR TESTIMONY OR THE QUANTITY OF DOCUMENTS. YOU MUST KEEP IN MIND THAT THE BURDEN OF PROOF IS

ALWAYS ON THE GOVERNMENT AND A DEFENDANT IS NOT REQUIRED TO CALL ANY WITNESS OR OFFER ANY EVIDENCE BECAUSE A DEFENDANT IS PRESUMED TO BE INNOCENT.

BY THE SAME TOKEN, YOU DO NOT HAVE TO ACCEPT THE TESTIMONY OF ANY WITNESS WHO HAS NOT BEEN CONTRADICTED OR IMPEACHED, IF YOU FIND THE WITNESS NOT TO BE CREDIBLE. YOU ALSO HAVE TO DECIDE WHICH WITNESSES TO BELIEVE AND WHICH FACTS ARE TRUE. TO DO THIS YOU MUST LOOK AT ALL THE EVIDENCE, DRAWING UPON YOUR OWN COMMON SENSE AND PERSONAL EXPERIENCE. BUT, AGAIN, YOU MUST KEEP IN MIND THAT THE BURDEN OF PROOF IS ALWAYS ON THE GOVERNMENT AND A DEFENDANT IS

NOT REQUIRED TO CALL ANY WITNESSES OR OFFER ANY EVIDENCE, BECAUSE THEY ARE PRESUMED TO BE INNOCENT.

ALL AVAILABLE EVIDENCE NEED NOT BE PRODUCED

THE LAW DOES NOT REQUIRE ANY PARTY TO CALL AS WITNESSES ALL PERSONS WHO MAY HAVE BEEN PRESENT AT ANY TIME OR PLACE INVOLVED IN THE CASE, OR WHO MAY APPEAR TO HAVE SOME KNOWLEDGE OF THE MATTER IN ISSUE AT THIS TRIAL. NOR DOES THE LAW REQUIRE ANY PARTY TO PRODUCE AS EXHIBITS ALL PAPERS AND THINGS MENTIONED DURING THE COURSE OF THE TRIAL. AND, OF COURSE, A DEFENDANT IN A CRIMINAL CASE IS NOT REQUIRED TO CALL ANY WITNESSES OR PRODUCE ANY EVIDENCE AT ALL.

INTERVIEWED WITNESSES

DURING THE COURSE OF TRIAL YOU HEARD TESTIMONY THAT ATTORNEYS INTERVIEWED WITNESSES WHEN PREPARING FOR AND DURING THE TRIAL. YOU MUST NOT DRAW ANY UNFAVORABLE INFERENCE FROM THAT FACT.

ON THE CONTRARY, ATTORNEYS ARE OBLIGED TO PREPARE THEIR CASE AS THOROUGHLY AS POSSIBLE, AND IN THE DISCHARGE OF THAT RESPONSIBILITY, PROPERLY INTERVIEW WITNESSES IN PREPARATION FOR THE TRIAL AND FROM TIME TO TIME AS MAY BE REQUIRED DURING THE COURSE OF TRIAL.

SPECIFIC INVESTIGATIVE TECHNIQUES NOT REQUIRED

DURING THE TRIAL YOU HAVE HEARD TESTIMONY OF WITNESSES AND ARGUMENT BY COUNSEL THAT THE GOVERNMENT DID NOT UTILIZE SPECIFIC INVESTIGATIVE TECHNIQUES OR EXHAUSTIVELY PURSUE EVERY PIECE OF INFORMATION. YOU MAY CONSIDER THESE FACTS IN DECIDING WHETHER THE GOVERNMENT HAS MET ITS BURDEN OF PROOF, BECAUSE, AS I TOLD YOU, YOU SHOULD LOOK AT ALL OF THE EVIDENCE OR LACK OF EVIDENCE IN DECIDING WHETHER THE GOVERNMENT HAS PROVEN A PARTICULAR CHARGE BEYOND A REASONABLE DOUBT.

HOWEVER, YOU ARE ALSO INSTRUCTED THAT THERE IS NO LEGAL REQUIREMENT THAT THE

GOVERNMENT USE ANY SPECIFIC INVESTIGATIVE TECHNIQUES OR PURSUE EVERY INVESTIGATIVE LEAD TO PROVE ITS CASE. LAW ENFORCEMENT TECHNIQUES ARE NOT YOUR CONCERN. YOUR CONCERN IS TO DETERMINE WHETHER OR NOT, BASED UPON ALL THE EVIDENCE PRESENTED IN THE CASE, THE GOVERNMENT HAS PROVEN THAT THE DEFENDANT IS GUILTY BEYOND A REASONABLE DOUBT.

OTHER INDIVIDUALS NOT ON TRIAL

IN ADDITION TO THE EVIDENCE ABOUT THE INVOLVEMENT OF COOPERATING ACCOMPLICES WHO TESTIFIED AT TRIAL, EVIDENCE HAS ALSO BEEN INTRODUCED AS TO THE INVOLVEMENT OF CERTAIN OTHER INDIVIDUALS IN THE CRIMES CHARGED IN THE INDICTMENT. YOU MAY NOT DRAW ANY INFERENCE, FAVORABLE OR UNFAVORABLE, TOWARD THE GOVERNMENT OR THE DEFENDANT ON TRIAL FROM THE FACT THAT CERTAIN PERSONS WERE NOT NAMED AS DEFENDANTS IN THIS INDICTMENT. YOU SHOULD DRAW NO INFERENCE FROM THE FACT THAT ANY OTHER PERSON IS NOT PRESENT AT THIS TRIAL. YOUR CONCERN IS SOLELY THE DEFENDANTS ON TRIAL BEFORE YOU.

THAT OTHER INDIVIDUALS ARE NOT ON TRIAL BEFORE YOU IS NOT A MATTER OF CONCERN TO YOU. YOU SHOULD NOT SPECULATE AS TO THE REASONS THESE INDIVIDUALS ARE NOT ON TRIAL BEFORE YOU. THE FACT THAT THESE INDIVIDUALS ARE NOT ON TRIAL BEFORE YOU SHOULD NOT CONTROL OR INFLUENCE YOUR VERDICT WITH REFERENCE TO THE DEFENDANTS WHO ARE ON TRIAL. YOU MUST ONLY CONSIDER WHETHER THE GOVERNMENT HAS PROVED, BEYOND A REASONABLE DOUBT, THAT EITHER OF THE DEFENDANTS IS GUILTY OF A CRIME. THE FACT THAT THESE INDIVIDUALS ARE NOT ON TRIAL BEFORE YOU SHOULD NOT CONTROL OR INFLUENCE IN ANY WAY YOUR

VERDICT WITH REFERENCE TO EITHER OF THE

DEFENDANTS.

WEIGHING CREDIBILITY INCLUDING *FALSUS IN UNO*

IN DECIDING WHAT THE FACTS ARE, YOU MUST DECIDE WHICH TESTIMONY TO BELIEVE AND WHICH TESTIMONY NOT TO BELIEVE. IN MAKING THAT DECISION, YOU SHOULD USE THE SAME REASON YOU WOULD EMPLOY IN MAKING DETERMINATIONS IMPORTANT IN YOUR OWN AFFAIRS THAT ARE BASED ON INFORMATION GIVEN TO YOU BY OTHERS. THERE ARE A NUMBER OF FACTORS YOU MAY TAKE INTO ACCOUNT IN DETERMINING WHETHER THE TESTIMONY OF A WITNESS IS BELIEVABLE, INCLUDING THE FOLLOWING:

(1) DID THE WITNESS IMPRESS YOU AS HONEST?

(2) DID THE WITNESS HAVE ANY PARTICULAR REASON NOT TO TELL THE TRUTH?

(3) DID THE WITNESS HAVE A PERSONAL INTEREST IN THE OUTCOME OF THE CASE?

(4) DID THE WITNESS SEEM TO HAVE A GOOD MEMORY?

(5) DID THE WITNESS HAVE THE OPPORTUNITY AND ABILITY TO OBSERVE ACCURATELY THE THINGS HE TESTIFIED ABOUT?

(6) DID THE WITNESS APPEAR TO UNDERSTAND THE QUESTIONS CLEARLY AND ANSWER THEM DIRECTLY?

(7) DID THE WITNESS'S TESTIMONY DIFFER FROM THE TESTIMONY OF OTHER WITNESSES?

PEOPLE SOMETIMES FORGET THINGS. A CONTRADICTION MAY BE AN INNOCENT LAPSE OF MEMORY OR IT MAY BE AN INTENTIONAL FALSEHOOD.

CONSIDER, THEREFORE, WHETHER THE CONTRADICTION, IF THERE WAS ONE, HAS TO DO WITH AN IMPORTANT FACT, OR ONLY A SMALL DETAIL.

DIFFERENT PEOPLE OBSERVING AN EVENT MAY REMEMBER IT DIFFERENTLY AND THEREFORE TESTIFY ABOUT IT DIFFERENTLY.

BUT, IF ANY WITNESS IS SHOWN TO HAVE WILLFULLY LIED ABOUT ANY MATERIAL MATTER, YOU HAVE THE RIGHT TO CONCLUDE THAT THE WITNESS ALSO LIED ABOUT OTHER MATTERS. YOU MAY EITHER DISREGARD ALL OF THAT WITNESS'S TESTIMONY, OR YOU MAY ACCEPT WHATEVER PART OF IT YOU THINK DESERVES TO BE BELIEVED.

YOU MAY CONSIDER THE FACTORS I HAVE JUST

DISCUSSED WITH YOU IN DECIDING HOW MUCH WEIGHT TO GIVE TO TESTIMONY.

TESTIMONY OF COOPERATING ACCOMPLICES

YOU HAVE HEARD FROM WITNESSES WHO EACH TESTIFIED THAT THEY WERE ACTUALLY INVOLVED IN PLANNING AND CARRYING OUT THE CRIMES CHARGED IN THE INDICTMENT.

INDEED, IT IS THE LAW IN FEDERAL COURTS THAT THE TESTIMONY OF AN ACCOMPLICE MAY BE ENOUGH IN ITSELF FOR CONVICTION, IF THE JURY FINDS THAT THE TESTIMONY IS CREDIBLE AND ESTABLISHES GUILT BEYOND A REASONABLE DOUBT.

HOWEVER, IT IS ALSO THE CASE THAT ACCOMPLICE TESTIMONY IS OF SUCH NATURE THAT IT MUST BE SCRUTINIZED WITH GREAT CARE AND VIEWED WITH PARTICULAR CAUTION WHEN YOU DECIDE HOW MUCH

OF THAT TESTIMONY TO BELIEVE.

I HAVE GIVEN YOU SOME GENERAL CONSIDERATIONS ON CREDIBILITY AND I WILL NOT REPEAT THEM ALL HERE. NOR WILL I REPEAT ALL OF THE ARGUMENTS MADE ON BOTH SIDES.

HOWEVER, LET ME SAY A FEW THINGS THAT YOU MAY WANT TO CONSIDER DURING YOUR DELIBERATIONS ON THE SUBJECT OF ACCOMPLICES.

YOU SHOULD ASK YOURSELVES WHETHER ANY OF THESE SO-CALLED ACCOMPLICES WOULD BENEFIT MORE BY LYING, OR BY TELLING THE TRUTH.

WAS THE TESTIMONY OF ANY MADE UP IN ANY WAY BECAUSE HE OR SHE BELIEVED OR HOPED THAT HE OR SHE WOULD SOMEHOW RECEIVE FAVORABLE

TREATMENT BY TESTIFYING FALSELY?

OR DID ANY BELIEVE THAT HIS OR HER INTERESTS WOULD BE BEST SERVED BY TESTIFYING TRUTHFULLY?

IF YOU BELIEVE THAT ANY OF THE WITNESSES WAS MOTIVATED BY HOPES OF PERSONAL GAIN, WAS THE MOTIVATION ONE WHICH WOULD CAUSE HIM OR HER TO LIE, OR WAS IT ONE WHICH WOULD CAUSE HIM OR HER TO TELL THE TRUTH?

DID THIS MOTIVATION COLOR HIS OR HER TESTIMONY?

IN SUM, YOU SHOULD LOOK AT ALL OF THE EVIDENCE IN DECIDING WHAT CREDENCE AND WHAT WEIGHT, IF ANY, YOU WILL WANT TO GIVE TO ANY OF THE COOPERATING ACCOMPLICE WITNESSES.

FINALLY, THE COOPERATING WITNESSES HAVE PLED GUILTY TO CHARGES ARISING OUT OF THE SAME FACTS AS THIS CASE. YOU ARE INSTRUCTED THAT YOU ARE TO DRAW NO CONCLUSIONS OR INFERENCES OF ANY KIND ABOUT THE GUILT OF A DEFENDANT ON TRIAL FROM THE FACT THAT A PROSECUTION WITNESS PLED GUILTY TO SIMILAR CHARGES. THAT WITNESS'S DECISION TO PLEAD GUILTY WAS A PERSONAL DECISION ABOUT HIS OR HER OWN GUILT. THE FACT THAT A COOPERATING WITNESS PLEADED GUILTY MAY NOT BE USED BY YOU IN ANY WAY AS EVIDENCE AGAINST OR UNFAVORABLE TO A DEFENDANT ON TRIAL HERE.

TESTIMONY OF IMMUNIZED WITNESSES (IF APPLICABLE)

AS YOU WERE INFORMED DURING THE TRIAL, SOME OF THE TESTIMONY BEFORE YOU CAME FROM WITNESSES WHO WERE ASSURED BY THE GOVERNMENT THAT, IN EXCHANGE FOR TESTIFYING TRUTHFULLY, COMPLETELY, AND FULLY, THEY WOULD NOT BE PROSECUTED BASED ON THEIR TESTIMONY FOR ANY CRIMES THAT THEY MAY HAVE ADMITTED HERE IN COURT.

LIKE THE TESTIMONY OF COOPERATING WITNESSES, YOU MAY CONVICT THE DEFENDANT ON THE BASIS OF SUCH WITNESSES' TESTIMONY ALONE, IF YOU FIND THAT THE TESTIMONY PROVES THE DEFENDANT GUILTY BEYOND A REASONABLE DOUBT. HOWEVER, THE TESTIMONY OF A WITNESS WHO HAS BEEN PROMISED THAT HE WILL NOT BE PROSECUTED SHOULD BE EXAMINED BY YOU WITH GREATER CARE THAN THE TESTIMONY OF AN ORDINARY WITNESS. YOU SHOULD

SCRUTINIZE IT CLOSELY TO DETERMINE WHETHER OR NOT IT IS COLORED IN SUCH A WAY AS TO PLACE GUILT UPON THE DEFENDANT IN ORDER TO FURTHER THE WITNESS'S OWN INTEREST.

YOU MUST CONSIDER WHETHER SUCH WITNESS WAS MOTIVATED TO MAKE UP TESTIMONY IN THE HOPE OR BELIEF THAT SUCH WAS MORE LIKELY TO ENSURE THE WITNESS'S OWN FREEDOM FROM PROSECUTION. OR, ASK YOURSELVES, DID THE WITNESS BELIEVE HIS INTERESTS WOULD BE BEST SERVED BY TESTIFYING TRUTHFULLY? IT IS FOR YOU TO DECIDE, BASED ON YOUR OWN PERCEPTIONS AND COMMON SENSE, TO WHAT EXTENT, IF AT ALL, THE WITNESS'S INTEREST HAS AFFECTED OR COLORED HIS TESTIMONY. YOU SHOULD CAREFULLY SCRUTINIZE ALL THE EVIDENCE IN

DECIDING WHETHER YOU BELIEVE AN IMMUNIZED WITNESS AND WHAT WEIGHT, IF ANY, HIS TESTIMONY DESERVES.

SIMILAR ACTS EVIDENCE

DURING THIS TRIAL, YOU HAVE HEARD EVIDENCE THAT, ON OTHER OCCASIONS, A DEFENDANT ENGAGED IN CONDUCT THAT WAS SIMILAR IN NATURE TO THE CONDUCT CHARGED IN THE INDICTMENT. EVIDENCE OF PRIOR SIMILAR ACTS WAS ADMITTED AS BACKGROUND EVIDENCE TO SHOW THE DEVELOPMENT OF RELATIONSHIPS OF TRUST BETWEEN A DEFENDANT AND THE GOVERNMENT'S WITNESSES AND TO PROVIDE BACKGROUND EVIDENCE OF THE CHARGED CRIMES. IN ADDITION, IF YOU DETERMINE THAT A DEFENDANT COMMITTED THE ACTS CHARGED IN THE INDICTMENT AND THE SIMILAR ACTS AS WELL, THEN YOU MAY, BUT NEED NOT, DRAW AN INFERENCE THAT, IN DOING THE

ACTS CHARGED IN THE INDICTMENT, A DEFENDANT ACTED KNOWINGLY AND INTENTIONALLY AND NOT BECAUSE OF SOME MISTAKE, ACCIDENT, CARELESSNESS, OR OTHER INNOCENT REASONS.

HOWEVER, A DEFENDANT IS ON TRIAL ONLY FOR COMMITTING THE ACTS ALLEGED IN THE INDICTMENT. YOU MAY NOT CONSIDER EVIDENCE OF ANY SIMILAR ACTS AS A SUBSTITUTE FOR PROOF THAT ANY DEFENDANT COMMITTED THE CRIMES CHARGED IN THIS CASE. NOR MAY YOU CONSIDER THIS EVIDENCE AS PROOF THAT ANY DEFENDANT HAS A CRIMINAL PROPENSITY OR BAD CHARACTER. THE EVIDENCE OF OTHER SIMILAR ACTS WAS ADMITTED FOR LIMITED

PURPOSES AND YOU MAY CONSIDER IT ONLY FOR THOSE LIMITED PURPOSES.

CHARACTER EVIDENCE

THE DEFENDANTS CALLED WITNESSES, WHO GAVE THEIR OPINIONS OF THE DEFENDANTS' GOOD CHARACTER. THIS TESTIMONY IS NOT TO BE TAKEN BY YOU AS THE WITNESS'S OPINION AS TO WHETHER ANY DEFENDANT IS GUILTY OR NOT GUILTY. THAT QUESTION IS FOR YOU ALONE TO DETERMINE. YOU SHOULD, HOWEVER, CONSIDER THIS CHARACTER EVIDENCE TOGETHER WITH ALL THE OTHER FACTS AND ALL THE OTHER EVIDENCE IN THE CASE IN DETERMINING WHETHER A DEFENDANT IS GUILTY OR NOT GUILTY OF THE CHARGES.

ACCORDINGLY, IF AFTER CONSIDERING ALL THE EVIDENCE, INCLUDING TESTIMONY ABOUT A

DEFENDANT'S GOOD CHARACTER, YOU FIND A REASONABLE DOUBT HAS BEEN CREATED, YOU MUST ACQUIT HIM OR HER OF ALL THE CHARGES.

ON THE OTHER HAND IF, AFTER CONSIDERING ALL THE EVIDENCE, INCLUDING THAT OF A DEFENDANT'S CHARACTER, YOU ARE SATISFIED BEYOND A REASONABLE DOUBT THAT ANY DEFENDANT IS GUILTY, YOU MUST NOT ACQUIT HIM OR HER MERELY BECAUSE YOU BELIEVE HIM OR HER TO BE A PERSON OF GOOD CHARACTER.

ADMISSION OF DEFENDANT (IF APPLICABLE)

THERE HAS BEEN EVIDENCE THAT A DEFENDANT MADE CERTAIN STATEMENTS TO THE SECURITIES AND EXCHANGE COMMISSION (ALSO REFERRED TO AS THE SEC) IN WHICH THE GOVERNMENT CLAIMS THE DEFENDANT ADMITTED CERTAIN FACTS CHARGED IN THE SUPERSEDING INDICTMENT. I INSTRUCT YOU THAT YOU ARE TO GIVE THE STATEMENTS SUCH WEIGHT AS YOU FEEL THEY DESERVE IN LIGHT OF ALL THE EVIDENCE.

DEFENDANTS' RIGHT NOT TO TESTIFY (IF APPLICABLE)

[NEITHER/ONE OF THE] DEFENDANT[S] DID NOT [TESTIFY/TESTIFIED] IN THIS CASE. UNDER OUR CONSTITUTION, THE DEFENDANTS HAVE NO OBLIGATION TO TESTIFY OR TO PRESENT ANY OTHER EVIDENCE BECAUSE IT IS THE PROSECUTION'S BURDEN TO PROVE A DEFENDANT GUILTY BEYOND A REASONABLE DOUBT. THAT BURDEN REMAINS WITH THE PROSECUTION THROUGHOUT THE ENTIRE TRIAL AND NEVER SHIFTS TO A DEFENDANT. A DEFENDANT IS NEVER REQUIRED TO PROVE THAT HE OR SHE IS INNOCENT.

YOU MAY NOT ATTACH ANY SIGNIFICANCE TO THE FACT THAT A DEFENDANT DID NOT TESTIFY. NO

ADVERSE INFERENCE AGAINST HIM OR HER MAY BE DRAWN BY YOU BECAUSE HE OR SHE DID NOT TAKE THE WITNESS STAND. YOU MAY NOT CONSIDER THIS AGAINST A DEFENDANT IN ANY WAY IN YOUR DELIBERATIONS IN THE JURY ROOM.

TESTIMONY OF DEFENDANT (IF APPLICABLE)

IN A CRIMINAL CASE, THE DEFENDANT CANNOT BE REQUIRED TO TESTIFY, BUT, IF THE DEFENDANT CHOOSES TO TESTIFY, HE OR SHE IS, OF COURSE, PERMITTED TO TAKE THE WITNESS STAND ON HIS OWN BEHALF. YOU SHOULD EXAMINE AND EVALUATE THE DEFENDANT'S TESTIMONY JUST AS YOU WOULD THE TESTIMONY OF ANY WITNESS WITH AN INTEREST IN THE OUTCOME OF THIS CASE. YOU SHOULD NOT DISREGARD OR DISBELIEVE THE DEFENDANT'S TESTIMONY SIMPLY BECAUSE HE OR SHE IS CHARGED AS THE DEFENDANT IN THIS CASE.

EXPERT WITNESS

IN THIS CASE, I HAVE PERMITTED A WITNESS, DEBORAH OREMLAND, TO EXPRESS OPINIONS ABOUT CERTAIN MATTERS THAT ARE IN ISSUE. A WITNESS MAY BE PERMITTED TO TESTIFY TO AN OPINION ON THOSE MATTERS ABOUT WHICH SHE HAS SPECIAL KNOWLEDGE, SKILL, EXPERIENCE AND TRAINING. SUCH TESTIMONY IS PRESENTED TO YOU ON THE THEORY THAT SOMEONE WHO IS EXPERIENCED AND KNOWLEDGEABLE IN THE FIELD CAN ASSIST YOU IN UNDERSTANDING THE EVIDENCE OR IN REACHING AN INDEPENDENT DECISION ON THE FACTS.

IN WEIGHING THIS OPINION TESTIMONY, YOU MAY CONSIDER THE WITNESS'S QUALIFICATIONS, OPINIONS,

THE REASONS FOR TESTIFYING, AS WELL AS ALL OF THE OTHER CONSIDERATIONS THAT ORDINARILY APPLY WHEN YOU ARE DECIDING WHETHER OR NOT TO BELIEVE A WITNESS'S TESTIMONY. YOU MAY GIVE THE OPINION WHATEVER WEIGHT, IF ANY, YOU FIND IT DESERVES IN LIGHT OF ALL THE EVIDENCE IN THIS CASE. YOU SHOULD NOT, HOWEVER, ACCEPT OPINION TESTIMONY MERELY BECAUSE I ALLOWED THESE WITNESSES TO TESTIFY CONCERNING THAT OPINION. NOR SHOULD YOU SUBSTITUTE IT FOR YOUR OWN REASON, JUDGMENT, AND COMMON SENSE. THE DETERMINATION OF THE FACTS IN THIS CASE RESTS SOLELY WITH YOU.

LAW ENFORCEMENT EMPLOYEE TESTIMONY

DURING THIS TRIAL, YOU HAVE HEARD THE TESTIMONY OF ACTIVE LAW ENFORCEMENT EMPLOYEES. THE FACT THAT A WITNESS IS A LAW ENFORCEMENT EMPLOYEE DOES NOT MEAN THAT HIS OR HER TESTIMONY IS ENTITLED TO ANY GREATER WEIGHT. BY THE SAME TOKEN, THE TESTIMONY OF SUCH A WITNESS IS NOT ENTITLED TO LESS CONSIDERATION FOR THAT REASON.

AT THE SAME TIME, IT IS QUITE LEGITIMATE FOR DEFENSE COUNSEL TO TRY TO ATTACK THE CREDIBILITY OF A LAW ENFORCEMENT WITNESS ON THE GROUNDS THAT HIS OR HER TESTIMONY MAY BE COLORED BY A PERSONAL OR PROFESSIONAL INTEREST

IN THE OUTCOME OF THE CASE.

YOU SHOULD CONSIDER THE TESTIMONY OF A LAW ENFORCEMENT EMPLOYEE JUST AS YOU WOULD ANY OTHER EVIDENCE IN THE CASE AND EVALUATE HIS OR HER CREDIBILITY JUST AS YOU WOULD THAT OF ANY OTHER WITNESS. AFTER REVIEWING ALL THE EVIDENCE, YOU WILL DECIDE WHETHER TO ACCEPT THE TESTIMONY OF A LAW ENFORCEMENT EMPLOYEE, AND WHAT WEIGHT, IF ANY, THAT TESTIMONY DESERVES.

PRIOR INCONSISTENT STATEMENTS

YOU HAVE HEARD EVIDENCE THAT A WITNESS MADE A STATEMENT ON AN EARLIER OCCASION WHICH COUNSEL ARGUES IS INCONSISTENT WITH THE WITNESS'S TRIAL TESTIMONY. EVIDENCE OF WHAT IS ARGUABLY A PRIOR INCONSISTENT STATEMENT WAS PLACED BEFORE YOU FOR THE LIMITED PURPOSE OF HELPING YOU DECIDE WHETHER TO BELIEVE THE TRIAL TESTIMONY WHO CONTRADICTED HIMSELF OR HERSELF. IF YOU FIND THAT THE WITNESS MADE AN EARLIER STATEMENT THAT CONFLICTS WITH HIS OR HER TRIAL TESTIMONY, YOU MAY CONSIDER THAT FACT IN DECIDING HOW MUCH OF HIS OR HER TRIAL TESTIMONY, IF ANY, TO BELIEVE.

IN MAKING THIS DETERMINATION, YOU MAY CONSIDER WHETHER THE WITNESS PURPOSELY MADE A FALSE STATEMENT OR WHETHER IT WAS AN INNOCENT

MISTAKE; WHETHER THE INCONSISTENCY CONCERNS AN IMPORTANT FACT, OR WHETHER IT HAD TO DO WITH A SMALL DETAIL; WHETHER THE WITNESS HAD AN EXPLANATION FOR THE INCONSISTENCY, AND WHETHER THAT EXPLANATION APPEALED TO YOUR COMMON SENSE.

IT IS EXCLUSIVELY YOUR DUTY, BASED UPON ALL THE EVIDENCE AND YOUR OWN GOOD JUDGMENT, TO DETERMINE WHETHER THE PRIOR STATEMENT WAS INCONSISTENT, AND IF SO HOW MUCH, IF ANY, WEIGHT TO BE GIVEN TO THE INCONSISTENT STATEMENT IN DETERMINING WHETHER TO BELIEVE ALL, PART, OR NONE OF THE WITNESS'S TESTIMONY.

II. LEGAL ELEMENTS OF THE CRIMES CHARGED

INTRODUCTION TO INDICTMENT

I WILL NOW TURN TO THE SECOND PART OF THIS CHARGE -- AND WILL, AS I INDICATED AT THE OUTSET, INSTRUCT YOU AS TO THE SPECIFIC ELEMENTS OF THE CRIMES CHARGED THAT THE GOVERNMENT MUST PROVE BEYOND A REASONABLE DOUBT TO WARRANT FINDINGS OF GUILT IN THIS CASE.

THE DEFENDANTS ARE FORMALLY CHARGED IN AN INDICTMENT. AS I INSTRUCTED YOU AT THE BEGINNING OF THIS CASE, AN INDICTMENT IS A CHARGE OR ACCUSATION. THE INDICTMENT IN THIS CASE CONTAINS A TOTAL OF 10 COUNTS.

THERE ARE TWO DEFENDANTS ON TRIAL BEFORE

YOU. YOU MUST, AS A MATTER OF LAW, CONSIDER EACH COUNT OF THE INDICTMENT AND EACH DEFENDANT'S INVOLVEMENT IN THAT COUNT SEPARATELY, AND YOU MUST RETURN A SEPARATE VERDICT ON EACH DEFENDANT FOR EACH COUNT ON WHICH HE OR SHE IS CHARGED.

IN REACHING YOUR VERDICT, BEAR IN MIND THAT GUILT IS PERSONAL AND INDIVIDUAL. YOUR VERDICT OF GUILTY OR NOT GUILTY MUST BE BASED SOLELY UPON THE EVIDENCE ABOUT EACH DEFENDANT. THE CASE AGAINST EACH DEFENDANT, ON EACH COUNT, STANDS OR FALLS UPON THE PROOF OR LACK OF PROOF AGAINST THAT DEFENDANT ALONE, AND YOUR VERDICT AS TO ANY DEFENDANT ON ANY COUNT SHOULD NOT

CONTROL YOUR DECISION AS TO ANY OTHER DEFENDANT OR ANY OTHER COUNT. NO OTHER CONSIDERATIONS ARE PROPER.

THE INDICTMENT CHARGES THREE COUNTS AS TO BOTH DEFENDANTS: ONE COUNT OF CONSPIRACY TO COMMIT SECURITIES FRAUD, ONE COUNT OF CONSPIRACY TO COMMIT MAIL AND WIRE FRAUD, AND ONE COUNT OF SECURITIES FRAUD. IN ADDITION, THE INDICTMENT CHARGES ABRAXAS DISCALA WITH ONE COUNT OF SECURITIES FRAUD AND SIX COUNTS OF WIRE FRAUD.

DATES APPROXIMATE

THE INDICTMENT CHARGES "ON OR ABOUT" CERTAIN DATES. IT DOES NOT MATTER IF THE INDICTMENT CHARGES THAT A SPECIFIC ACT OCCURRED ON OR ABOUT A CERTAIN DATE, AND THE EVIDENCE INDICATES THAT, IN FACT, IT WAS ON ANOTHER DATE. THE LAW ONLY REQUIRES SUBSTANTIAL SIMILARITY BETWEEN THE DATES ALLEGED IN THE INDICTMENT AND THE DATE ESTABLISHED BY TESTIMONY OR EXHIBITS.

USE OF CONJUNCTIVE AND DISJUNCTIVE IN INDICTMENT

ONE OR MORE COUNTS OF THE INDICTMENT MAY ACCUSE A DEFENDANT OF VIOLATING THE SAME STATUTE IN MORE THAN ONE WAY. IN OTHER WORDS, THE INDICTMENT MAY ALLEGE THAT THE STATUTE IN QUESTION WAS VIOLATED BY VARIOUS ACTS WHICH ARE IN THE INDICTMENT JOINED BY THE CONJUNCTIVE "AND," WHILE THE STATUTE AND THE ELEMENTS OF THE OFFENSE ARE STATED IN THE DISJUNCTIVE, USING THE WORD "OR." IN THESE INSTANCES, IT IS SUFFICIENT FOR A FINDING OF GUILT IF THE EVIDENCE ESTABLISHED BEYOND A REASONABLE DOUBT THE VIOLATION OF THE STATUTE BY ANY ONE OF THE ACTS CHARGED.

KNOWINGLY AND INTENTIONALLY

DURING THESE INSTRUCTIONS ON THE ELEMENTS OF THE CRIMES CHARGED, YOU WILL HEAR ME USE THE WORDS "KNOWINGLY," AND "INTENTIONALLY" FROM TIME TO TIME. BEFORE YOU CAN FIND A DEFENDANT GUILTY, YOU MUST BE SATISFIED THAT THE DEFENDANT WAS ACTING KNOWINGLY AND INTENTIONALLY.

A PERSON ACTS "KNOWINGLY" IF HE OR SHE ACTS INTENTIONALLY AND VOLUNTARILY, AND NOT BECAUSE OF IGNORANCE, MISTAKE, ACCIDENT, OR CARELESSNESS. WHETHER A DEFENDANT ACTED KNOWINGLY MAY BE PROVEN BY HIS OR HER CONDUCT AND BY ALL OF THE FACTS AND CIRCUMSTANCES SURROUNDING THE CASE.

A PERSON ACTS "INTENTIONALLY" IF HE OR SHE

ACTS DELIBERATELY AND PURPOSEFULLY. THAT IS, THE ACTS MUST HAVE BEEN THE PRODUCT OF HIS OR HER CONSCIOUS, OBJECTIVE DECISION RATHER THAN THE PRODUCT OF A MISTAKE OR ACCIDENT.

THESE ISSUES OF KNOWLEDGE AND INTENT REQUIRE YOU TO MAKE A DETERMINATION ABOUT A DEFENDANT'S STATE OF MIND, SOMETHING THAT CAN RARELY BE PROVED DIRECTLY. A WISE AND CAREFUL CONSIDERATION OF ALL THE CIRCUMSTANCES BEFORE YOU MAY, HOWEVER, PERMIT YOU TO MAKE A DETERMINATION AS TO A DEFENDANT'S STATE OF MIND. INDEED, IN YOUR EVERYDAY AFFAIRS, YOU ARE FREQUENTLY CALLED UPON TO DETERMINE A PERSON'S STATE OF MIND FROM HIS OR HER WORDS AND ACTIONS

IN GIVEN CIRCUMSTANCES. YOU ARE ASKED TO DO THE SAME HERE.

WILLFULLY

TO ACT "WILLFULLY" MEANS TO ACT KNOWINGLY AND PURPOSELY, WITH AN INTENT TO DO SOMETHING THE LAW FORBIDS, THAT IS TO SAY, WITH BAD PURPOSE EITHER TO DISOBEY OR TO DISREGARD THE LAW.

COUNT TWO: CONSPIRACY TO COMMIT MAIL AND WIRE FRAUD

FOR THE SAKE OF CLARITY, I WILL FIRST ADDRESS COUNT TWO OF THE INDICTMENT, THEN COUNT ONE, AND THEN THE REMAINING COUNTS. COUNT TWO OF THE INDICTMENT CHARGES BOTH DEFENDANTS WITH CONSPIRACY TO COMMIT MAIL AND WIRE FRAUD. SPECIFICALLY, COUNT TWO STATES, IN PERTINENT PART:

IN OR ABOUT AND BETWEEN OCTOBER 2012 AND JULY 2014, BOTH DATES BEING APPROXIMATE AND INCLUSIVE, WITHIN THE EASTERN DISTRICT OF NEW YORK AND ELSEWHERE, THE DEFENDANTS ABRAXAS J. DISCALA AND KYLEEN

CANE, TOGETHER WITH OTHERS, DID KNOWINGLY AND INTENTIONALLY CONSPIRE:

TO DEVISE A SCHEME AND ARTIFICE TO DEFRAUD INVESTORS AND POTENTIAL INVESTORS IN THE MANIPULATED PUBLIC COMPANIES, AND TO OBTAIN MONEY AND PROPERTY FROM THEM BY MEANS OF MATERIALLY FALSE AND FRAUDULENT PRETENSES, REPRESENTATIONS AND PROMISES, AND, FOR THE PURPOSE OF EXECUTING SUCH SCHEME AND ARTIFICE, TO CAUSE TO BE DELIVERED MATTER AND THINGS BY FEDEX CORP. ("FEDEX") AND OTHER PRIVATE AND COMMERCIAL INTERSTATE CARRIERS

ACCORDING TO THE DIRECTION THEREON, CONTRARY TO TITLE 18, UNITED STATES CODE, SECTION 1341; AND

TO DEVISE A SCHEME AND ARTIFICE TO DEFRAUD INVESTORS AND POTENTIAL INVESTORS IN THE MANIPULATED PUBLIC COMPANIES, AND TO OBTAIN MONEY AND PROPERTY FROM THEM BY MEANS OF MATERIALLY FALSE AND FRAUDULENT PRETENSES, REPRESENTATIONS AND PROMISES, AND, FOR THE PURPOSE OF EXECUTING SUCH SCHEME AND ARTIFICE,

TO TRANSMIT AND CAUSE TO BE TRANSMITTED BY MEANS OF WIRE COMMUNICATION IN

INTERSTATE AND FOREIGN COMMERCE WRITINGS, SIGNS, SIGNALS, PICTURES AND SOUNDS, CONTRARY TO TITLE 18, UNITED STATES CODE, SECTION 1343.

I WILL FIRST EXPLAIN THE CRIME OF CONSPIRACY GENERALLY BEFORE TURNING TO THE ALLEGED OBJECTS OF THE CHARGED CONSPIRACY – THAT IS, OF WIRE FRAUD.

A CONSPIRACY IS AN OFFENSE SEPARATE FROM THE COMMISSION OF ANY OFFENSE THAT MAY HAVE BEEN COMMITTED PURSUANT TO THE CONSPIRACY. THAT IS BECAUSE THE FORMATION OF A CONSPIRACY, OF A PARTNERSHIP FOR CRIMINAL PURPOSES, IS IN AND OF ITSELF A CRIME. THUS, IF A CONSPIRACY EXISTS, EVEN

IF IT SHOULD FAIL IN ACHIEVING ITS UNLAWFUL PURPOSE, IT IS STILL PUNISHABLE AS A CRIME. THE ESSENCE OF THE CHARGE OF CONSPIRACY IS AN UNDERSTANDING BETWEEN OR AMONG TWO OR MORE PERSONS, THAT THEY WILL ACT TOGETHER TO ACCOMPLISH A COMMON OBJECTIVE THAT THEY KNOW IS UNLAWFUL.

IN ORDER TO PROVE THE CRIME OF CONSPIRACY, THE GOVERNMENT MUST PROVE TWO ELEMENTS BEYOND A REASONABLE DOUBT:

FIRST, THE FIRST ELEMENT IS THAT TWO OR MORE PERSONS ENTERED INTO THE CHARGED CONSPIRACY;

SECOND, THE SECOND ELEMENT IS THAT THE DEFENDANTS BECAME MEMBERS OF THE CONSPIRACY

WITH KNOWLEDGE OF ITS CRIMINAL GOAL OR GOALS AND INTENDING BY THEIR ACTIONS TO HELP IT SUCCEED.

ELEMENTS OF CONSPIRACY

FIRST ELEMENT – EXISTENCE OF AGREEMENT

THE FIRST ELEMENT THAT THE GOVERNMENT MUST PROVE BEYOND A REASONABLE DOUBT TO ESTABLISH THE OFFENSE OF CONSPIRACY IS THAT TWO OR MORE PERSONS ENTERED INTO THE CHARGED CONSPIRACY. ONE PERSON CANNOT COMMIT THE CRIME OF CONSPIRACY ALONE.

IN ORDER FOR THE GOVERNMENT TO SATISFY THIS ELEMENT, YOU NEED NOT FIND THAT THE ALLEGED MEMBERS OF THE CONSPIRACY MET TOGETHER AND ENTERED INTO ANY EXPRESS OR FORMAL AGREEMENT. SIMILARLY, YOU NEED NOT FIND THAT THE ALLEGED CONSPIRATORS STATED, IN WORDS OR WRITING, WHAT

THE SCHEME WAS, ITS OBJECT OR PURPOSE, OR EVERY PRECISE DETAIL OF THE SCHEME OR THE MEANS BY WHICH ITS OBJECT OR PURPOSE WAS TO BE ACCOMPLISHED. INDEED, IT IS SUFFICIENT FOR THE GOVERNMENT TO SHOW THAT THE CONSPIRATORS CAME TO A MUTUAL UNDERSTANDING, EITHER SPOKEN OR UNSPOKEN, BETWEEN TWO OR MORE PEOPLE TO COOPERATE WITH EACH OTHER TO ACCOMPLISH AN UNLAWFUL ACT.

YOU MAY, OF COURSE, FIND THAT THE EXISTENCE OF AN AGREEMENT TO DISOBEY OR DISREGARD THE LAW HAS BEEN ESTABLISHED BY DIRECT PROOF. HOWEVER, SINCE CONSPIRACY IS, BY ITS VERY NATURE, CHARACTERIZED BY SECRECY, YOU MAY ALSO INFER ITS

EXISTENCE FROM THE CIRCUMSTANCES OF A GIVEN CASE AND THE CONDUCT OF THE PARTIES INVOLVED.

IN THE CONTEXT OF CONSPIRACY CASES, ACTIONS OFTEN SPEAK LOUDER THAN WORDS. IN DETERMINING WHETHER AN AGREEMENT EXISTED HERE, CONSIDER THE ACTIONS AND STATEMENTS OF ALL OF THOSE YOU FIND TO BE PARTICIPANTS AS PROOF THAT A COMMON DESIGN EXISTED ON THE PART OF THE PERSONS CHARGED TO ACT TOGETHER TO ACCOMPLISH AN UNLAWFUL PURPOSE.

SECOND ELEMENT – MEMBERSHIP IN THE CONSPIRACY

THE SECOND ELEMENT THAT THE GOVERNMENT MUST PROVE BEYOND A REASONABLE DOUBT TO ESTABLISH THE OFFENSE OF CONSPIRACY, IS THAT A DEFENDANT BECAME A MEMBER IN THE CHARGED CONSPIRACY WITH KNOWLEDGE OF ITS CRIMINAL GOAL OR GOALS AND INTENDING BY HIS OR HER ACTIONS TO HELP IT SUCCEED.

IF YOU ARE SATISFIED THAT THE CONSPIRACY CHARGED IN THE INDICTMENT EXISTED, YOU MUST NEXT ASK YOURSELVES WHO THE MEMBERS OF THAT CONSPIRACY WERE. IN DECIDING WHETHER EITHER DEFENDANT WAS, IN FACT, A MEMBER OF THE CONSPIRACY, YOU SHOULD CONSIDER WHETHER, BASED

UPON ALL OF THE EVIDENCE, IT APPEARS THAT A DEFENDANT KNOWINGLY AND WILLFULLY JOINED THE CONSPIRACY. DID A DEFENDANT PARTICIPATE IN IT WITH KNOWLEDGE OF ITS UNLAWFUL PURPOSE AND WITH THE SPECIFIC INTENTION OF FURTHERING ITS BUSINESS OR OBJECTIVE AS AN ASSOCIATE OR WORKER?

NOW, IT HAS BEEN SAID THAT IN ORDER FOR EITHER DEFENDANT TO BE DEEMED A PARTICIPANT IN A CONSPIRACY, HE OR SHE MUST HAVE HAD A STAKE IN THE VENTURE OR ITS OUTCOME. YOU ARE INSTRUCTED THAT, WHILE PROOF OF A FINANCIAL INTEREST IN THE OUTCOME OF A SCHEME IS NOT ESSENTIAL, IF YOU FIND THAT A DEFENDANT HAD SUCH AN INTEREST, THAT IS A FACTOR THAT YOU MAY PROPERLY CONSIDER IN

DETERMINING WHETHER OR NOT A DEFENDANT WAS A MEMBER OF THE CONSPIRACY CHARGED IN THE INDICTMENT.

AS I MENTIONED A MOMENT AGO, BEFORE EITHER DEFENDANT CAN BE FOUND TO HAVE BEEN A CONSPIRATOR, YOU MUST FIRST FIND THAT HE OR SHE KNOWINGLY JOINED IN THE UNLAWFUL AGREEMENT OR PLAN. THE KEY QUESTION, THEREFORE, IS WHETHER EITHER DEFENDANT JOINED THE CONSPIRACY WITH AN AWARENESS OF AT LEAST SOME OF THE BASIC AIMS AND PURPOSES OF THE UNLAWFUL AGREEMENT.

IT IS IMPORTANT FOR YOU TO NOTE THAT A DEFENDANT'S PARTICIPATION IN THE CONSPIRACY MUST BE ESTABLISHED BY INDEPENDENT EVIDENCE OF

HIS OR HER OWN ACTS OR STATEMENTS, AS WELL AS THOSE OF THE OTHER ALLEGED CO-CONSPIRATORS, AND THE REASONABLE INFERENCES WHICH MAY BE DRAWN FROM THEM.

A DEFENDANT'S KNOWLEDGE IS A MATTER OF INFERENCE FROM THE FACTS PROVED. IN THAT CONNECTION, I INSTRUCT YOU THAT TO BECOME A MEMBER OF THE CONSPIRACY, A DEFENDANT NEED NOT HAVE KNOWN THE IDENTITIES OF EACH AND EVERY OTHER MEMBER, NOR NEED HE OR SHE HAVE BEEN APPRISED OF ALL OF THEIR ACTIVITIES. MOREOVER, A DEFENDANT NEED NOT HAVE BEEN FULLY INFORMED AS TO ALL OF THE DETAILS, OR THE SCOPE, OF THE CONSPIRACY IN ORDER TO JUSTIFY AN INFERENCE OF

KNOWLEDGE ON HIS OR HER PART. FURTHERMORE, A DEFENDANT NEED NOT HAVE JOINED IN ALL OF THE CONSPIRACY'S UNLAWFUL OBJECTIVES.

THE EXTENT OF A DEFENDANT'S PARTICIPATION HAS NO BEARING ON THE ISSUE OF THAT DEFENDANT'S GUILT. A CONSPIRATOR'S LIABILITY IS NOT MEASURED BY THE EXTENT OR DURATION OF HIS PARTICIPATION. INDEED, EACH MEMBER MAY PERFORM SEPARATE AND DISTINCT ACTS AND MAY PERFORM THEM AT DIFFERENT TIMES. SOME CONSPIRATORS PLAY MAJOR ROLES, WHILE OTHERS PLAY MINOR PARTS IN THE SCHEME. AN EQUAL ROLE IS NOT WHAT THE LAW REQUIRES. IN FACT, EVEN A SINGLE ACT MAY BE SUFFICIENT TO DRAW A DEFENDANT WITHIN THE AMBIT OF THE CONSPIRACY.

I WANT TO CAUTION YOU, HOWEVER, THAT A DEFENDANT'S MERE PRESENCE AT THE SCENE OF AN ALLEGED CRIME DOES NOT, BY ITSELF, MAKE HIM OR HER A MEMBER OF THE CONSPIRACY. SIMILARLY, MERE ASSOCIATION WITH ONE OR MORE MEMBERS OF THE CONSPIRACY DOES NOT AUTOMATICALLY MAKE A DEFENDANT A MEMBER. A PERSON MAY KNOW, OR BE FRIENDLY WITH, A CRIMINAL, WITHOUT BEING A CRIMINAL HIMSELF OR HERSELF. MERE SIMILARITY OF CONDUCT OR THE FACT THAT THEY MAY HAVE ASSEMBLED TOGETHER AND DISCUSSED COMMON AIMS AND INTERESTS DOES NOT NECESSARILY ESTABLISH PROOF OF THE EXISTENCE OF A CONSPIRACY.

I ALSO WANT TO CAUTION YOU THAT MERE

KNOWLEDGE OR ACQUIESCENCE, WITHOUT PARTICIPATION, IN THE UNLAWFUL PLAN IS NOT SUFFICIENT. MOREOVER, THE FACT THAT THE ACTS OF A DEFENDANT, WITHOUT KNOWLEDGE, MERELY HAPPEN TO FURTHER THE PURPOSES OR OBJECTIVES OF THE CONSPIRACY, DOES NOT MAKE THE DEFENDANT A MEMBER. MORE IS REQUIRED UNDER THE LAW. WHAT IS NECESSARY IS THAT A DEFENDANT MUST HAVE PARTICIPATED WITH KNOWLEDGE OF AT LEAST SOME OF THE PURPOSES OR OBJECTIVES OF THE CONSPIRACY AND WITH THE INTENTION OF AIDING IN THE ACCOMPLISHMENT OF THOSE UNLAWFUL ENDS.

IN SUM, A DEFENDANT, WITH AN UNDERSTANDING OF THE UNLAWFUL CHARACTER OF THE CONSPIRACY,

MUST HAVE INTENTIONALLY ENGAGED, ADVISED OR ASSISTED IN IT FOR THE PURPOSE OF FURTHERING THE ILLEGAL UNDERTAKING. HE OR SHE THEREBY BECAME A KNOWING AND WILLING PARTICIPANT IN THE UNLAWFUL AGREEMENT – THAT IS TO SAY, A CONSPIRATOR. AGAIN, AN ACT IS DONE "WILLFULLY" IF DONE VOLUNTARILY AND INTENTIONALLY, AND WITH THE SPECIFIC INTENT TO DO SOMETHING THE LAW FORBIDS – THAT IS TO SAY, WITH A BAD PURPOSE EITHER TO DISOBEY OR DISREGARD THE LAW.

THE SUBSTANTIVE OFFENSES OF MAIL AND WIRE FRAUD

TO DETERMINE WHETHER THE GOVERNMENT HAS PROVED BEYOND A REASONABLE DOUBT THAT EITHER DEFENDANT ENGAGED IN AN ILLEGAL CONSPIRACY, YOU MUST ALSO UNDERSTAND THE CRIMES THAT COUNT TWO CHARGES THEM WITH AGREEING TO COMMIT.

THE CRIMES ALLEGED TO BE THE OBJECTS OR PURPOSES OF THE CONSPIRACY – THE THING THAT COUNT TWO CHARGES THE DEFENDANTS WITH AGREEING TO COMMIT – ARE MAIL AND WIRE FRAUD. I WILL FIRST DISCUSS MAIL FRAUD, AND THEN TURN TO WIRE FRAUD.

MAIL FRAUD

FIRST, THAT THERE WAS A SCHEME OR ARTIFICE TO DEFRAUD OR TO OBTAIN MONEY OR PROPERTY BY MATERIALLY FALSE AND FRAUDULENT PRETENSES, REPRESENTATIONS OR PROMISES;

SECOND, THAT THE DEFENDANTS KNOWINGLY AND WILLFULLY PARTICIPATED IN THE SCHEME OR ARTIFICE TO DEFRAUD, WITH KNOWLEDGE OF ITS FRAUDULENT NATURE AND WITH SPECIFIC INTENT TO DEFRAUD; AND

THIRD, THAT, IN EXECUTION OR IN FURTHERANCE OF THAT SCHEME, THE USE OF THE MAILS OCCURRED.

I WILL NOW EXPLAIN EACH OF THESE ELEMENTS FURTHER.

FIRST ELEMENT – SCHEME TO DEFRAUD

THE FIRST ELEMENT THE GOVERNMENT MUST PROVE BEYOND A REASONABLE DOUBT IS THE EXISTENCE OF A SCHEME OR ARTIFICE TO DEFRAUD OR TO OBTAIN MONEY OR PROPERTY BY MEANS OF FALSE OR FRAUDULENT PRETENSES, REPRESENTATIONS OR PROMISES.

A "SCHEME OR ARTIFICE" IS MERELY A PLAN FOR THE ACCOMPLISHMENT OF AN OBJECTIVE. "FRAUD" IS A GENERAL TERM WHICH EMBRACES ALL THE VARIOUS MEANS THAT AN INDIVIDUAL CAN DEVISE AND THAT ARE USED BY AN INDIVIDUAL TO GAIN AN ADVANTAGE OVER ANOTHER BY FALSE REPRESENTATIONS, SUGGESTIONS, OR DELIBERATE DISREGARD FOR THE TRUTH.

A "SCHEME TO DEFRAUD" IS ANY PATTERN OR COURSE OF CONDUCT DESIGNED TO OBTAIN MONEY OR PROPERTY BY MEANS OF TRICK, DECEIT, DECEPTION OR BY FALSE OR FRAUDULENT REPRESENTATIONS OR PROMISES. A REPRESENTATION OR STATEMENT IS FRAUDULENT IF IT WAS FALSELY MADE WITH THE INTENT TO DECEIVE. HALF-TRUTHS, THE CONCEALMENT OR OMISSION OF MATERIAL FACTS, OR THE EXPRESSION OF AN OPINION NOT HONESTLY ENTERTAINED MAY ALSO CONSTITUTE FALSE OR FRAUDULENT STATEMENTS UNDER THE STATUTE. THE FRAUDULENT REPRESENTATION MUST RELATE TO A MATERIAL FACT OR MATTER. A MATERIAL FACT IS ONE WHICH WOULD REASONABLY BE EXPECTED TO BE OF CONCERN TO A

REASONABLE AND PRUDENT PERSON IN RELYING UPON THE REPRESENTATION OR STATEMENT IN MAKING A DECISION.

THE DECEPTION NEED NOT BE PREMISED UPON SPOKEN OR WRITTEN WORDS ALONE. THE ARRANGEMENT OF THE WORDS, OR THE CIRCUMSTANCES IN WHICH THEY ARE USED MAY CONVEY A FALSE AND DECEPTIVE APPEARANCE. IF THERE IS INTENTIONAL DECEPTION, THE MANNER IN WHICH IT IS ACCOMPLISHED DOES NOT MATTER.

THE GOVERNMENT IS NOT REQUIRED TO ESTABLISH THAT EITHER DEFENDANT HIMSELF OR HERSELF ORIGINATED THE SCHEME TO DEFRAUD. NOR IS IT NECESSARY THAT EITHER DEFENDANT ACTUALLY

REALIZED ANY GAIN FROM THE SCHEME, OR THAT THE INTENDED VICTIM ACTUALLY SUFFERED ANY LOSS. SUCCESS IS NOT AN ELEMENT OF THE CRIME CHARGED. THAT IS BECAUSE ONLY A SCHEME TO DEFRAUD, AND NOT ACTUAL FRAUD, MUST BE PROVED TO SUSTAIN A CONVICTION.

A SCHEME TO DEFRAUD NEED NOT BE SHOWN BY DIRECT EVIDENCE, BUT MAY BE ESTABLISHED BY ALL OF THE CIRCUMSTANCES AND FACTS IN THE CASE.

IT IS ALSO NOT NECESSARY THAT THE GOVERNMENT PROVE EACH AND EVERY MISREPRESENTATION OR FALSE PROMISE THAT THE GOVERNMENT ALLEGES. IT IS SUFFICIENT IF THE GOVERNMENT PROVES, BEYOND A REASONABLE DOUBT,

THAT ONE OR MORE OF THE MATERIAL MISREPRESENTATIONS WAS MADE IN FURTHERANCE OF THE SCHEME TO DEFRAUD. YOU MUST, HOWEVER, ALL AGREE ON AT LEAST ONE MISREPRESENTATION THAT IS PROVED TO BE FALSE. THAT IS, YOU CANNOT FIND A DEFENDANT GUILTY IF ONLY SOME OF YOU THINK THAT MISREPRESENTATION "A" IS FALSE, WHILE OTHERS THINK THAT ONLY MISREPRESENTATION "B" IS FALSE. THERE MUST BE AT LEAST ONE SPECIFIC PRETENSE, REPRESENTATION OR PROMISE ABOUT A MATERIAL FACT THAT ALL OF YOU FIND TO BE FALSE IN ORDER TO FIND A DEFENDANT GUILTY.

IF YOU FIND THAT THE GOVERNMENT HAS SUSTAINED ITS BURDEN OF PROOF THAT A SCHEME TO

DEFRAUD, AS CHARGED, DID EXIST, YOU NEXT SHOULD CONSIDER THE SECOND ELEMENT OF THE OFFENSE OF MAIL FRAUD.

SECOND ELEMENT - INTENT TO DEFRAUD

THE SECOND ELEMENT THAT THE GOVERNMENT MUST PROVE BEYOND A REASONABLE DOUBT IS THAT A DEFENDANT EXECUTED THE SCHEME KNOWINGLY, WILLFULLY, AND WITH SPECIFIC INTENT TO DEFRAUD A VICTIM.

AGAIN, TO ACT "KNOWINGLY" MEANS TO ACT VOLUNTARILY AND DELIBERATELY, RATHER THAN MISTAKENLY OR BECAUSE OF IGNORANCE OR ACCIDENT.

TO ACT "WILLFULLY" MEANS TO ACT KNOWINGLY AND PURPOSELY, WITH AN INTENT TO DO SOMETHING THE LAW FORBIDS; THAT IS TO SAY, WITH A BAD PURPOSE TO DISOBEY OR DISREGARD THE LAW.

TO ACT WITH "INTENT TO DEFRAUD" MEANS TO ACT KNOWINGLY AND WITH THE SPECIFIC INTENT TO DECEIVE, FOR THE PURPOSE OF OBTAINING MONEY OR PROPERTY FROM ANOTHER.

HOW SOMEONE ACTED – HIS OR HER STATE OF MIND – IS A QUESTION OF FACT FOR YOU TO DETERMINE.

DIRECT PROOF OF KNOWLEDGE AND FRAUDULENT INTENT IS NOT ALWAYS AVAILABLE, NOR IS IT REQUIRED. THE ULTIMATE FACTS OF KNOWLEDGE AND CRIMINAL INTENT MAY BE ESTABLISHED BY CIRCUMSTANTIAL EVIDENCE, WHICH I EXPLAINED TO YOU EARLIER. CIRCUMSTANTIAL EVIDENCE, IF BELIEVED, IS OF NO LESS VALUE THAN DIRECT EVIDENCE.

SINCE AN ESSENTIAL ELEMENT OF THE MAIL FRAUD CRIME CHARGED IS INTENT TO DEFRAUD, IT FOLLOWS THAT GOOD FAITH ON THE PART OF A DEFENDANT IS A COMPLETE DEFENSE TO A CHARGE OF WIRE FRAUD. A DEFENDANT, HOWEVER, HAS NO BURDEN TO ESTABLISH A DEFENSE OF GOOD FAITH. THE BURDEN IS ON THE GOVERNMENT TO PROVE FRAUDULENT INTENT AND CONSEQUENT LACK OF GOOD FAITH BEYOND A REASONABLE DOUBT.

UNDER THE MAIL FRAUD STATUTE, EVEN FALSE REPRESENTATIONS OR STATEMENTS, OR OMISSIONS OF MATERIAL FACTS, DO NOT AMOUNT TO A FRAUD UNLESS DONE WITH FRAUDULENT INTENT. HOWEVER MISLEADING OR DECEPTIVE A PLAN MAY BE, IT IS NOT

FRAUDULENT IF IT WAS DEVISED OR CARRIED OUT IN GOOD FAITH. AN HONEST BELIEF IN THE TRUTH OF THE REPRESENTATIONS MADE BY OR ON BEHALF OF THE DEFENDANT IS A COMPLETE DEFENSE, HOWEVER INACCURATE THE STATEMENTS MAY TURN OUT TO BE.

IN DETERMINING WHETHER A DEFENDANT ACTED KNOWINGLY, YOU MAY CONSIDER WHETHER THAT DEFENDANT DELIBERATELY CLOSED HIS OR HER EYES TO WHAT OTHERWISE WOULD HAVE BEEN OBVIOUS TO HIM OR HER. YOU MAY ONLY INFER KNOWLEDGE OF THE EXISTENCE OF A PARTICULAR FACT IF A DEFENDANT WAS AWARE OF A HIGH PROBABILITY OF ITS EXISTENCE, UNLESS THAT DEFENDANT ACTUALLY BELIEVED THAT IT DID NOT EXIST. IF YOU FIND BEYOND

A REASONABLE DOUBT THAT A DEFENDANT ACTED WITH A CONSCIOUS PURPOSE TO AVOID LEARNING A HIGHLY PROBABLE TRUTH, THEN THIS ELEMENT MAY BE SATISFIED. HOWEVER, GUILTY KNOWLEDGE MAY NOT BE ESTABLISHED BY DEMONSTRATING THAT A DEFENDANT WAS MERELY NEGLIGENT, FOOLISH, CARELESS, OR MISTAKEN.

THERE IS ANOTHER CONSIDERATION TO BEAR IN MIND IN DECIDING WHETHER OR NOT THE DEFENDANT ACTED IN GOOD FAITH. YOU ARE INSTRUCTED THAT IF A DEFENDANT PARTICIPATED IN THE SCHEME TO DEFRAUD, THEN A BELIEF BY THAT DEFENDANT, IF SUCH A BELIEF EXISTED, THAT ULTIMATELY EVERYTHING WOULD WORK OUT SO THAT NO ONE WOULD LOSE ANY

MONEY DOES NOT REQUIRE YOU TO FIND THAT THAT DEFENDANT ACTED IN GOOD FAITH. NO AMOUNT OF HONEST BELIEF ON THE PART OF A DEFENDANT THAT THE SCHEME WOULD, FOR EXAMPLE, ULTIMATELY MAKE A PROFIT FOR INVESTORS, WILL EXCUSE FRAUDULENT ACTIONS OR FALSE REPRESENTATIONS CAUSED BY HIM OR HER.

AS A PRACTICAL MATTER, THEN, IN ORDER TO SUSTAIN A CHARGE OF MAIL FRAUD, THE GOVERNMENT MUST ESTABLISH BEYOND A REASONABLE DOUBT THAT A DEFENDANT KNEW THAT HIS OR HER CONDUCT AS A PARTICIPANT IN THE SCHEME WAS CALCULATED TO DECEIVE AND, NONETHELESS, HE OR SHE ASSOCIATED HIMSELF OR HERSELF WITH THE ALLEGED FRAUDULENT

SCHEME FOR THE PURPOSE OF CAUSING SOME FINANCIAL LOSS TO ANOTHER OR TO DEPRIVE ANOTHER OF THEIR INTEREST IN PROPERTY.

TO CONCLUDE WITH THIS ELEMENT, IF YOU FIND THE GOVERNMENT HAS ESTABLISHED BEYOND A REASONABLE DOUBT THAT A DEFENDANT WAS A KNOWING PARTICIPANT AND ACTED WITH INTENT TO DEFRAUD, YOU SHOULD CONSIDER THE THIRD ELEMENT OF THE MAIL FRAUD CHARGE.

THIRD ELEMENT – USE OF THE MAILS

THE THIRD AND FINAL ELEMENT THAT THE GOVERNMENT MUST ESTABLISH BEYOND A REASONABLE DOUBT IS THE USE OF THE MAILS IN FURTHERANCE OF THE SCHEME TO DEFRAUD. THE USE OF THE MAILS AS I HAVE USED IT HERE INCLUDES MATERIAL SENT THROUGH EITHER THE UNITED STATES POSTAL SERVICE OR A PRIVATE OR COMMERCIAL INTERSTATE CARRIER.

THE MAILED MATTER NEED NOT CONTAIN A FRAUDULENT REPRESENTATION OR PURPOSE OR REQUEST FOR MONEY. IT MUST, HOWEVER, FURTHER OR ASSIST IN THE CARRYING OUT OF THE SCHEME TO DEFRAUD. IT IS NOT NECESSARY FOR A DEFENDANT TO BE DIRECTLY OR PERSONALLY INVOLVED IN THE

MAILING, AS LONG AS THE MAILING WAS REASONABLY FORESEEABLE IN THE EXECUTION OF THE ALLEGED SCHEME TO DEFRAUD IN WHICH THAT DEFENDANT IS ACCUSED OF PARTICIPATING.

IN THIS REGARD, IT IS SUFFICIENT TO ESTABLISH THIS ELEMENT OF THE CRIME IF THE EVIDENCE JUSTIFIES A FINDING THAT A DEFENDANT CAUSED THE MAILING BY OTHERS. THIS DOES NOT MEAN THAT THAT DEFENDANT MUST SPECIFICALLY HAVE AUTHORIZED OTHERS TO DO THE MAILING.

WHEN ONE DOES AN ACT WITH KNOWLEDGE THAT THE USE OF THE MAILS WILL FOLLOW IN THE ORDINARY COURSE OF BUSINESS OR WHERE SUCH USE OF THE MAILS REASONABLY CAN BE FORESEEN, EVEN THOUGH

NOT ACTUALLY INTENDED, THEN HE OR SHE CAUSES THE MAILS TO BE USED.

WITH RESPECT TO THE USE OF THE MAILS, THE GOVERNMENT MUST ESTABLISH BEYOND A REASONABLE DOUBT THE PARTICULAR MAILING CHARGED IN THE INDICTMENT. HOWEVER, THE GOVERNMENT DOES NOT HAVE TO PROVE THAT THE MAILINGS WERE MADE ON THE EXACT DATE CHARGED IN THE INDICTMENT. IT IS SUFFICIENT IF THE EVIDENCE ESTABLISHES BEYOND A REASONABLE DOUBT THAT THE MAILING WAS MADE ON A DATE SUBSTANTIALLY SIMILAR TO THE DATE CHARGED IN THE INDICTMENT.

WIRE FRAUD

THE ELEMENTS OF WIRE FRAUD ARE AS FOLLOWS:

FIRST, THAT THERE WAS A SCHEME OR ARTIFICE TO DEFRAUD OR TO OBTAIN MONEY OR PROPERTY BY MATERIALLY FALSE AND FRAUDULENT PRETENSES, REPRESENTATIONS OR PROMISES;

SECOND, THAT THE DEFENDANTS KNOWINGLY AND WILLFULLY PARTICIPATED IN THE SCHEME OR ARTIFICE TO DEFRAUD, WITH KNOWLEDGE OF ITS FRAUDULENT NATURE AND WITH SPECIFIC INTENT TO DEFRAUD; AND

THIRD, THAT, IN EXECUTION OR IN FURTHERANCE OF THAT SCHEME, THE USE OF AN INTERSTATE OR FOREIGN WIRE OCCURRED. THIS WOULD INCLUDE THE USE OF A LANDLINE TELEPHONE OR CELL PHONE OR A

FAX MACHINE, OR THE TRANSMISSION OF ELECTRONIC DATA VIA THE RADIO, TELEVISION OR THE INTERNET.

I WILL NOW EXPLAIN EACH OF THESE ELEMENTS FURTHER.

FIRST ELEMENT – SCHEME TO DEFRAUD

THE FIRST ELEMENT THE GOVERNMENT MUST PROVE BEYOND A REASONABLE DOUBT IS THE EXISTENCE OF A SCHEME OR ARTIFICE TO DEFRAUD OR TO OBTAIN MONEY OR PROPERTY BY MEANS OF FALSE OR FRAUDULENT PRETENSES, REPRESENTATIONS OR PROMISES.

A "SCHEME OR ARTIFICE" IS MERELY A PLAN FOR THE ACCOMPLISHMENT OF AN OBJECTIVE. "FRAUD" IS A GENERAL TERM WHICH EMBRACES ALL THE VARIOUS MEANS THAT AN INDIVIDUAL CAN DEVISE AND THAT ARE USED BY AN INDIVIDUAL TO GAIN AN ADVANTAGE OVER ANOTHER BY FALSE REPRESENTATIONS, SUGGESTIONS, OR DELIBERATE DISREGARD FOR THE TRUTH.

A "SCHEME TO DEFRAUD" IS ANY PATTERN OR COURSE OF CONDUCT DESIGNED TO OBTAIN MONEY OR PROPERTY BY MEANS OF TRICK, DECEIT, DECEPTION OR BY FALSE OR FRAUDULENT REPRESENTATIONS OR PROMISES. A REPRESENTATION OR STATEMENT IS FRAUDULENT IF IT WAS FALSELY MADE WITH THE INTENT TO DECEIVE. HALF-TRUTHS, THE CONCEALMENT OR OMISSION OF MATERIAL FACTS, OR THE EXPRESSION OF AN OPINION NOT HONESTLY ENTERTAINED MAY ALSO CONSTITUTE FALSE OR FRAUDULENT STATEMENTS UNDER THE STATUTE. THE FRAUDULENT REPRESENTATION MUST RELATE TO A MATERIAL FACT OR MATTER. A MATERIAL FACT IS ONE WHICH WOULD REASONABLY BE EXPECTED TO BE OF CONCERN TO A

REASONABLE AND PRUDENT PERSON IN RELYING UPON THE REPRESENTATION OR STATEMENT IN MAKING A DECISION.

THE DECEPTION NEED NOT BE PREMISED UPON SPOKEN OR WRITTEN WORDS ALONE. THE ARRANGEMENT OF THE WORDS, OR THE CIRCUMSTANCES IN WHICH THEY ARE USED MAY CONVEY A FALSE AND DECEPTIVE APPEARANCE. IF THERE IS INTENTIONAL DECEPTION, THE MANNER IN WHICH IT IS ACCOMPLISHED DOES NOT MATTER.

THE GOVERNMENT IS NOT REQUIRED TO ESTABLISH THAT EITHER DEFENDANT HIMSELF OR HERSELF ORIGINATED THE SCHEME TO DEFRAUD. NOR IS IT NECESSARY THAT EITHER DEFENDANT ACTUALLY

REALIZED ANY GAIN FROM THE SCHEME, OR THAT THE INTENDED VICTIM ACTUALLY SUFFERED ANY LOSS. SUCCESS IS NOT AN ELEMENT OF THE CRIME CHARGED. THAT IS BECAUSE ONLY A SCHEME TO DEFRAUD, AND NOT ACTUAL FRAUD, MUST BE PROVED TO SUSTAIN A CONVICTION.

A SCHEME TO DEFRAUD NEED NOT BE SHOWN BY DIRECT EVIDENCE, BUT MAY BE ESTABLISHED BY ALL OF THE CIRCUMSTANCES AND FACTS IN THE CASE.

IT IS ALSO NOT NECESSARY THAT THE GOVERNMENT PROVE EACH AND EVERY MISREPRESENTATION OR FALSE PROMISE THAT THE GOVERNMENT ALLEGES. IT IS SUFFICIENT IF THE GOVERNMENT PROVES, BEYOND A REASONABLE DOUBT,

THAT ONE OR MORE OF THE MATERIAL MISREPRESENTATIONS WAS MADE IN FURTHERANCE OF THE SCHEME TO DEFRAUD. YOU MUST, HOWEVER, ALL AGREE ON AT LEAST ONE MISREPRESENTATION THAT IS PROVED TO BE FALSE. THAT IS, YOU CANNOT FIND A DEFENDANT GUILTY IF ONLY SOME OF YOU THINK THAT MISREPRESENTATION "A" IS FALSE, WHILE OTHERS THINK THAT ONLY MISREPRESENTATION "B" IS FALSE. THERE MUST BE AT LEAST ONE SPECIFIC PRETENSE, REPRESENTATION OR PROMISE ABOUT A MATERIAL FACT THAT ALL OF YOU FIND TO BE FALSE IN ORDER TO FIND A DEFENDANT GUILTY.

IF YOU FIND THAT THE GOVERNMENT HAS SUSTAINED ITS BURDEN OF PROOF THAT A SCHEME TO

DEFRAUD, AS CHARGED, DID EXIST, YOU NEXT SHOULD CONSIDER THE SECOND ELEMENT OF THE OFFENSE OF WIRE FRAUD.

SECOND ELEMENT - INTENT TO DEFRAUD

THE SECOND ELEMENT THAT THE GOVERNMENT MUST PROVE BEYOND A REASONABLE DOUBT IS THAT A DEFENDANT EXECUTED THE SCHEME KNOWINGLY, WILLFULLY, AND WITH SPECIFIC INTENT TO DEFRAUD A VICTIM.

TO REPEAT, TO ACT "KNOWINGLY" MEANS TO ACT VOLUNTARILY AND DELIBERATELY, RATHER THAN MISTAKENLY OR BECAUSE OF IGNORANCE OR ACCIDENT.

TO ACT "WILLFULLY" MEANS TO ACT KNOWINGLY AND PURPOSELY, WITH AN INTENT TO DO SOMETHING THE LAW FORBIDS; THAT IS TO SAY, WITH A BAD PURPOSE TO DISOBEY OR DISREGARD THE LAW.

TO ACT WITH "INTENT TO DEFRAUD" MEANS TO ACT KNOWINGLY AND WITH THE SPECIFIC INTENT TO DECEIVE, FOR THE PURPOSE OF OBTAINING MONEY OR PROPERTY FROM ANOTHER.

HOW SOMEONE ACTED – HIS OR HER STATE OF MIND – IS A QUESTION OF FACT FOR YOU TO DETERMINE.

DIRECT PROOF OF KNOWLEDGE AND FRAUDULENT INTENT IS NOT ALWAYS AVAILABLE, NOR IS IT REQUIRED. THE ULTIMATE FACTS OF KNOWLEDGE AND CRIMINAL INTENT MAY BE ESTABLISHED BY CIRCUMSTANTIAL EVIDENCE, WHICH I EXPLAINED TO YOU EARLIER. CIRCUMSTANTIAL EVIDENCE, IF BELIEVED, IS OF NO LESS VALUE THAN DIRECT EVIDENCE.

SINCE AN ESSENTIAL ELEMENT OF THE WIRE FRAUD CRIME CHARGED IS INTENT TO DEFRAUD, IT FOLLOWS THAT GOOD FAITH ON THE PART OF A DEFENDANT IS A COMPLETE DEFENSE TO A CHARGE OF WIRE FRAUD. A DEFENDANT, HOWEVER, HAS NO BURDEN TO ESTABLISH A DEFENSE OF GOOD FAITH. THE BURDEN IS ON THE GOVERNMENT TO PROVE FRAUDULENT INTENT AND CONSEQUENT LACK OF GOOD FAITH BEYOND A REASONABLE DOUBT.

UNDER THE WIRE FRAUD STATUTE, EVEN FALSE REPRESENTATIONS OR STATEMENTS, OR OMISSIONS OF MATERIAL FACTS, DO NOT AMOUNT TO A FRAUD UNLESS DONE WITH FRAUDULENT INTENT. HOWEVER MISLEADING OR DECEPTIVE A PLAN MAY BE, IT IS NOT

FRAUDULENT IF IT WAS DEVISED OR CARRIED OUT IN GOOD FAITH. AN HONEST BELIEF IN THE TRUTH OF THE REPRESENTATIONS MADE BY OR ON BEHALF OF THE DEFENDANT IS A COMPLETE DEFENSE, HOWEVER INACCURATE THE STATEMENTS MAY TURN OUT TO BE.

IN DETERMINING WHETHER A DEFENDANT ACTED KNOWINGLY, YOU MAY CONSIDER WHETHER THAT DEFENDANT DELIBERATELY CLOSED HIS OR HER EYES TO WHAT OTHERWISE WOULD HAVE BEEN OBVIOUS TO HIM OR HER. YOU MAY ONLY INFER KNOWLEDGE OF THE EXISTENCE OF A PARTICULAR FACT IF A DEFENDANT WAS AWARE OF A HIGH PROBABILITY OF ITS EXISTENCE, UNLESS THAT DEFENDANT ACTUALLY BELIEVED THAT IT DID NOT EXIST. IF YOU FIND BEYOND

A REASONABLE DOUBT THAT A DEFENDANT ACTED WITH A CONSCIOUS PURPOSE TO AVOID LEARNING A HIGHLY PROBABLE TRUTH, THEN THIS ELEMENT MAY BE SATISFIED. HOWEVER, GUILTY KNOWLEDGE MAY NOT BE ESTABLISHED BY DEMONSTRATING THAT A DEFENDANT WAS MERELY NEGLIGENT, FOOLISH, CARELESS, OR MISTAKEN.

THERE IS ANOTHER CONSIDERATION TO BEAR IN MIND IN DECIDING WHETHER OR NOT THE DEFENDANT ACTED IN GOOD FAITH. YOU ARE INSTRUCTED THAT IF A DEFENDANT PARTICIPATED IN THE SCHEME TO DEFRAUD, THEN A BELIEF BY THAT DEFENDANT, IF SUCH A BELIEF EXISTED, THAT ULTIMATELY EVERYTHING WOULD WORK OUT SO THAT NO ONE WOULD LOSE ANY

MONEY DOES NOT REQUIRE YOU TO FIND THAT THAT DEFENDANT ACTED IN GOOD FAITH. NO AMOUNT OF HONEST BELIEF ON THE PART OF A DEFENDANT THAT THE SCHEME WOULD, FOR EXAMPLE, ULTIMATELY MAKE A PROFIT FOR INVESTORS, WILL EXCUSE FRAUDULENT ACTIONS OR FALSE REPRESENTATIONS CAUSED BY HIM OR HER.

AS A PRACTICAL MATTER, THEN, IN ORDER TO SUSTAIN A CHARGE OF WIRE FRAUD, THE GOVERNMENT MUST ESTABLISH BEYOND A REASONABLE DOUBT THAT A DEFENDANT KNEW THAT HIS OR HER CONDUCT AS A PARTICIPANT IN THE SCHEME WAS CALCULATED TO DECEIVE AND, NONETHELESS, HE OR SHE ASSOCIATED HIMSELF OR HERSELF WITH THE ALLEGED FRAUDULENT

SCHEME FOR THE PURPOSE OF CAUSING SOME FINANCIAL LOSS TO ANOTHER OR TO DEPRIVE ANOTHER OF THEIR INTEREST IN PROPERTY.

TO CONCLUDE WITH THIS ELEMENT, IF YOU FIND THE GOVERNMENT HAS ESTABLISHED BEYOND A REASONABLE DOUBT THAT A DEFENDANT WAS A KNOWING PARTICIPANT AND ACTED WITH INTENT TO DEFRAUD, YOU SHOULD CONSIDER THE THIRD ELEMENT OF THE WIRE FRAUD CHARGE.

THIRD ELEMENT – USE OF INTERSTATE WIRES

THE THIRD AND FINAL ELEMENT THAT THE GOVERNMENT MUST ESTABLISH BEYOND A REASONABLE DOUBT IS THE USE OF AN INTERSTATE WIRE COMMUNICATION IN FURTHERANCE OF THE SCHEME TO DEFRAUD. THE WIRE COMMUNICATION MUST PASS BETWEEN TWO OR MORE STATES, OR IT MUST PASS BETWEEN THE UNITED STATES AND A FOREIGN COUNTRY. A WIRE COMMUNICATION INCLUDES A WIRE TRANSFER OF FUNDS BETWEEN BANKS IN DIFFERENT STATES, AND TELEPHONE CALLS, EMAILS, AND FACSIMILES BETWEEN TWO DIFFERENT STATES.

THE USE OF THE WIRES NEED NOT ITSELF BE A FRAUDULENT REPRESENTATION. IT MUST, HOWEVER,

FURTHER OR ASSIST IN THE CARRYING OUT OF THE SCHEME TO DEFRAUD. IT IS NOT NECESSARY FOR A DEFENDANT TO BE DIRECTLY OR PERSONALLY INVOLVED IN THE WIRE COMMUNICATION, AS LONG AS THE COMMUNICATION WAS REASONABLY FORESEEABLE IN THE EXECUTION OF THE ALLEGED SCHEME TO DEFRAUD IN WHICH THAT DEFENDANT IS ACCUSED OF PARTICIPATING.

IN THIS REGARD, IT IS SUFFICIENT TO ESTABLISH THIS ELEMENT OF THE CRIME IF THE EVIDENCE JUSTIFIES A FINDING THAT A DEFENDANT CAUSED THE WIRES TO BE USED BY OTHERS. THIS DOES NOT MEAN THAT THAT DEFENDANT MUST SPECIFICALLY HAVE AUTHORIZED OTHERS TO MAKE THE CALL.

WHEN ONE DOES AN ACT WITH KNOWLEDGE THAT THE USE OF THE WIRES WILL FOLLOW IN THE ORDINARY COURSE OF BUSINESS OR WHERE SUCH USE OF THE WIRES REASONABLY CAN BE FORESEEN, EVEN THOUGH NOT ACTUALLY INTENDED, THEN HE OR SHE CAUSES THE WIRES TO BE USED.

COUNT ONE: CONSPIRACY TO COMMIT SECURITIES FRAUD

COUNT ONE ALSO CHARGES A CONSPIRACY, THOUGH OF A DIFFERENT TYPE. COUNT ONE OF THE INDICTMENT CHARGES BOTH DEFENDANTS WITH CONSPIRACY TO COMMIT SECURITIES FRAUD.

SPECIFICALLY, COUNT ONE STATES, IN PERTINENT PART:

IN OR ABOUT AND BETWEEN OCTOBER 2012 AND JULY 2014, BOTH DATES BEING APPROXIMATE AND INCLUSIVE, WITHIN THE EASTERN DISTRICT OF NEW YORK AND ELSEWHERE, THE DEFENDANTS

ABRAXAS J. DISCALA, ALSO KNOWN AS "AJ DISCALA," AND KYLEEN CANE, TOGETHER WITH OTHERS, DID KNOWINGLY AND WILLFULLY CONSPIRE TO USE AND EMPLOY MANIPULATIVE AND DECEPTIVE DEVICES AND CONTRIVANCES, CONTRARY TO RULE 10B-5 OF THE RULES AND REGULATIONS OF THE UNITED STATES SECURITIES AND EXCHANGE COMMISSION, TITLE 17, CODE OF FEDERAL REGULATIONS, SECTION 240.10B-5, BY (A) EMPLOYING DEVICES, SCHEMES AND ARTIFICES TO

DEFRAUD; (B) MAKING UNTRUE STATEMENTS OF MATERIAL FACT AND OMITTING TO STATE MATERIAL FACTS NECESSARY IN ORDER TO MAKE THE STATEMENTS MADE, IN LIGHT OF THE CIRCUMSTANCES UNDER WHICH THEY WERE MADE, NOT MISLEADING; AND (C) ENGAGING IN ACTS, PRACTICES AND COURSES OF BUSINESS WHICH WOULD AND DID OPERATE AS A FRAUD AND DECEIT UPON INVESTORS AND POTENTIAL INVESTORS IN THE MANIPULATED PUBLIC COMPANIES, IN CONNECTION WITH THE PURCHASE

AND SALE OF INVESTMENTS IN THE MANIPULATED PUBLIC COMPANIES, DIRECTLY AND INDIRECTLY, BY USE OF MEANS AND INSTRUMENTALITIES OF INTERSTATE COMMERCE AND THE MAILS, CONTRARY TO TITLE 15, UNITED STATES CODE, SECTIONS 78J(B) AND 78FF.

THE RELEVANT STATUTES FOR THIS CHARGE ARE 18 U.S.C. § 371, WHICH PROVIDES, IN RELEVANT PART:

IF TWO OR MORE PERSONS CONSPIRE EITHER TO COMMIT ANY OFFENSE AGAINST THE UNITED STATES . . . AND ONE OR MORE OF SUCH

PERSONS DO ANY ACT TO EFFECT THE OBJECT OF THE CONSPIRACY, EACH SHALL BE [PUNISHED].

AND, 15 U.S.C. § 78J, WHICH PROVIDES IN RELEVANT PART THAT:

IT SHALL BE UNLAWFUL FOR ANY PERSON, DIRECTLY OR INDIRECTLY, BY THE USE OF ANY MEANS OR INSTRUMENTALITY OF INTERSTATE COMMERCE OR OF THE MAILS, OR OF ANY FACILITY OF ANY NATIONAL SECURITIES EXCHANGE—

TO USE OR EMPLOY, IN CONNECTION WITH THE PURCHASE OR

SALE OF ANY SECURITY . . . ANY MANIPULATIVE OR DECEPTIVE DEVICE OR CONTRIVANCE IN CONTRAVENTION OF SUCH RULES AND REGULATIONS AS THE COMMISSION MAY PRESCRIBE AS NECESSARY OR APPROPRIATE IN THE PUBLIC INTEREST OR FOR THE PROTECTION OF INVESTORS.

I HAVE ALREADY INSTRUCTED YOU AS TO THE ELEMENTS THE GOVERNMENT MUST ESTABLISH TO PROVE EITHER DEFENDANT'S PARTICIPATION IN A CONSPIRACY. HOWEVER, AS WITH COUNT TWO, TO DETERMINE WHETHER THE GOVERNMENT HAS PROVED BEYOND A REASONABLE DOUBT THAT EITHER

DEFENDANT ENGAGED IN AN ILLEGAL CONSPIRACY, YOU MUST ALSO UNDERSTAND THE CRIMES THAT COUNT ONE CHARGES HIM OR HER WITH AGREEING TO COMMIT.

AS I NOTED, THE ALLEGED OBJECT OF THE CONSPIRACY CHARGED IN COUNT ONE IS SECURITIES FRAUD. THE ELEMENTS OF SECURITIES FRAUD ARE AS FOLLOWS:

FIRST, THAT IN CONNECTION WITH THE PURCHASE OR SALE OF A SECURITY, THE DEFENDANT DID ANY ONE OR MORE OF THE FOLLOWING:

(1) EMPLOYED A DEVICE, SCHEME OR ARTIFICE TO DEFRAUD, OR

(2) MADE AN UNTRUE STATEMENT OF A MATERIAL FACT OR OMITTED TO STATE A MATERIAL

FACT WHICH MADE WHAT WAS SAID, UNDER THE CIRCUMSTANCES, MISLEADING, OR

(3) ENGAGED IN AN ACT, PRACTICE OR COURSE OF BUSINESS THAT OPERATED, OR WOULD OPERATE, AS A FRAUD OR DECEIT UPON A PURCHASER OR SELLER;

SECOND, THAT THE DEFENDANT ACTED WILLFULLY, KNOWINGLY AND WITH THE INTENT TO DEFRAUD;

AND THIRD, THAT THE DEFENDANT KNOWINGLY USED, OR CAUSED TO BE USED, ANY MEANS OR INSTRUMENTS OF TRANSPORTATION OR COMMUNICATION IN INTERSTATE COMMERCE OR THE USE OF THE MAILS IN FURTHERANCE OF THE FRAUDULENT CONDUCT.

I WILL NOW GO THROUGH THESE ELEMENTS IN

GREATER DETAIL.

THE SUBSTANTIVE OFFENSE OF SECURITIES FRAUD

FIRST ELEMENT– FRAUDULENT ACT

THE FIRST ELEMENT THAT THE GOVERNMENT MUST PROVE BEYOND A REASONABLE DOUBT IS THAT, IN CONNECTION WITH THE PURCHASE OR SALE OF A SECURITY, THE DEFENDANT DID ONE OR MORE OF THE FOLLOWING:

(1) EMPLOYED A DEVICE, SCHEME OR ARTIFICE TO DEFRAUD, OR

(2) MADE AN UNTRUE STATEMENT OF A MATERIAL FACT OR OMITTED TO STATE A MATERIAL FACT NECESSARY IN ORDER TO MAKE THE STATEMENTS MADE, IN THE LIGHT OF THE CIRCUMSTANCES UNDER WHICH THEY WERE MADE, NOT MISLEADING, OR

(3) ENGAGED IN AN ACT, PRACTICE OR COURSE OF BUSINESS THAT OPERATED, OR WOULD OPERATE, AS A FRAUD OR DECEIT UPON A PURCHASER OR SELLER.

IT IS NOT NECESSARY FOR THE GOVERNMENT TO ESTABLISH ALL THREE TYPES OF UNLAWFUL CONDUCT IN CONNECTION WITH THE SALE OR PURCHASE OF A SECURITY. ANY ONE WILL BE SUFFICIENT FOR A CONVICTION, IF YOU SO FIND, BUT YOU MUST BE UNANIMOUS AS TO WHICH TYPE OF UNLAWFUL CONDUCT YOU FIND TO HAVE BEEN PROVEN.

A DEVICE, SCHEME OR ARTIFICE TO DEFRAUD IS MERELY A PLAN FOR THE ACCOMPLISHMENT OF ANY OBJECTIVE. FRAUD IS A GENERAL TERM WHICH EMBRACES ALL EFFORTS AND MEANS THAT INDIVIDUALS DEVISE TO TAKE ADVANTAGE OF OTHERS. THIS INCLUDES TECHNIQUES, SUCH AS WASH TRADES OR MATCH TRADES, THAT ARE INTENDED TO MISLEAD INVESTORS BY ARTIFICIALLY AFFECTING MARKET ACTIVITY. WASH TRADES ARE PREARRANGED PURCHASES AND SALES OF SECURITIES THAT MATCH EACH OTHER AT A SPECIFIED PRICE, VOLUME AND TIME

OF EXECUTION, SO AS TO INVOLVE NO CHANGE IN BENEFICIAL OWNERSHIP. MATCH TRADES ARE SIMILAR TO WASH TRADES BUT INVOLVE A RELATED THIRD PERSON OR PARTY WHO PLACES ONE SIDE OF THE TRADE. THE LAW WHICH THE DEFENDANTS ARE ALLEGED TO HAVE VIOLATED GENERALLY PROHIBITS PRACTICES SUCH AS WASH SALES, MATCHED ORDERS OR RIGGED PRICES THAT ARE INTENDED TO MISLEAD INVESTORS BY ARTIFICIALLY AFFECTING MARKET ACTIVITY.

THE FRAUDULENT OR DECEITFUL CONDUCT ALLEGED NEED NOT RELATE TO THE INVESTMENT VALUE OF THE SECURITIES INVOLVED IN THIS CASE.

YOU NEED NOT FIND THAT THE DEFENDANT ACTUALLY PARTICIPATED IN ANY SECURITIES TRANSACTION IF THE DEFENDANT WAS ENGAGED IN FRAUDULENT CONDUCT THAT WAS "IN CONNECTION WITH" A PURCHASE OR SALE. THE "IN CONNECTION

WITH" ASPECT OF THIS ELEMENT IS SATISFIED IF YOU FIND THAT THERE WAS SOME NEXUS OR RELATION BETWEEN THE ALLEGEDLY FRAUDULENT CONDUCT AND THE SALE OR PURCHASE OF SECURITIES. FRAUDULENT CONDUCT MAY BE "IN CONNECTION WITH" THE PURCHASE OR SALE OF SECURITIES IF YOU FIND THAT THE ALLEGED FRAUDULENT CONDUCT "TOUCHED UPON" A SECURITIES TRANSACTION.

IT IS NO DEFENSE TO AN OVERALL SCHEME TO DEFRAUD THAT THE DEFENDANT WAS NOT INVOLVED IN THE SCHEME FROM ITS INCEPTION OR PLAYED ONLY A MINOR ROLE WITH NO CONTACT WITH THE INVESTORS AND PURCHASERS OF THE SECURITIES IN QUESTION. NOR IS IT NECESSARY FOR YOU TO FIND THAT THE DEFENDANT WAS THE ACTUAL SELLER OR OFFEROR OF THE SECURITIES. IT IS SUFFICIENT IF THE DEFENDANT PARTICIPATED IN THE SCHEME OR FRAUDULENT CONDUCT THAT INVOLVED THE PURCHASE OR SALE OF

STOCK. BY THE SAME TOKEN, THE GOVERNMENT NEED NOT PROVE THAT THE DEFENDANT PERSONALLY MADE THE MISREPRESENTATION OR THAT HE OR SHE OMITTED THE MATERIAL FACT. IT IS SUFFICIENT IF THE GOVERNMENT ESTABLISHES THAT THE DEFENDANT CAUSED THE STATEMENT TO BE MADE OR THE FACT TO BE OMITTED. WITH REGARD TO THE ALLEGED MISREPRESENTATIONS AND OMISSIONS, YOU MUST DETERMINE WHETHER THE STATEMENT WAS TRUE OR FALSE WHEN IT WAS MADE, AND, IN THE CASE OF ALLEGED OMISSIONS, WHETHER THE OMISSION WAS MISLEADING.

IF YOU FIND THAT THE GOVERNMENT HAS ESTABLISHED BEYOND A REASONABLE DOUBT THAT A STATEMENT WAS FALSE OR OMITTED, YOU MUST NEXT DETERMINE WHETHER THE FACT MISSTATED WAS MATERIAL UNDER THE CIRCUMSTANCES. A MATERIAL FACT IS ONE THAT WOULD HAVE BEEN SIGNIFICANT TO

A REASONABLE INVESTOR'S INVESTMENT DECISION. THIS IS NOT TO SAY THAT THE GOVERNMENT MUST PROVE THAT THE MISREPRESENTATION WOULD HAVE DECEIVED A PERSON OF ORDINARY INTELLIGENCE. ONCE YOU FIND THAT THERE WAS A MATERIAL MISREPRESENTATION OR OMISSION OF A MATERIAL FACT, IT DOES NOT MATTER WHETHER THE INTENDED VICTIMS WERE GULLIBLE BUYERS OR SOPHISTICATED INVESTORS, BECAUSE THE SECURITIES LAWS PROTECT THE GULLIBLE AND UNSOPHISTICATED AS WELL AS THE EXPERIENCED INVESTOR.

NOR DOES IT MATTER WHETHER THE ALLEGED UNLAWFUL CONDUCT WAS SUCCESSFUL OR NOT, OR THAT THE DEFENDANT PROFITED OR RECEIVED ANY BENEFITS AS A RESULT OF THE ALLEGED SCHEME. SUCCESS IS NOT AN ELEMENT OF THE CRIME CHARGED. HOWEVER, IF YOU FIND THAT THE DEFENDANT DID PROFIT FROM THE ALLEGED SCHEME, YOU MAY

CONSIDER THAT IN RELATION TO THE THIRD ELEMENT OF INTENT, WHICH I WILL DISCUSS IN A MOMENT.

SECOND ELEMENT – KNOWLEDGE AND INTENT

THE SECOND ELEMENT THAT THE GOVERNMENT MUST ESTABLISH BEYOND A REASONABLE DOUBT IS THAT THE DEFENDANT PARTICIPATED IN THE SCHEME TO DEFRAUD KNOWINGLY, WILLFULLY AND WITH INTENT TO DEFRAUD.

THOSE TERMS HAVE THE SAME MEANINGS THAT I PREVIOUSLY PROVIDED TO YOU.

THIRD ELEMENT – INTERSTATE COMMERCE

THE THIRD AND FINAL ELEMENT THAT THE GOVERNMENT MUST PROVE BEYOND A REASONABLE DOUBT IS THAT THE DEFENDANT KNOWINGLY USED, OR CAUSED TO BE USED, THE MAILS OR ANY MEANS OR INSTRUMENTALITIES OF TRANSPORTATION OR COMMUNICATION IN INTERSTATE COMMERCE, INCLUDING TELEPHONES, IN FURTHERANCE OF THE SCHEME TO DEFRAUD.

IT IS NOT NECESSARY THAT A DEFENDANT BE DIRECTLY OR PERSONALLY INVOLVED IN ANY MAILING OR TELEPHONE CALLS. IF THE DEFENDANT WAS AN ACTIVE PARTICIPANT IN THE SCHEME AND TOOK STEPS OR ENGAGED IN CONDUCT WHICH HE OR SHE KNEW OR REASONABLY COULD FORESEE WOULD NATURALLY AND PROBABLY RESULT IN THE USE OF THE MAILS OR TELEPHONE LINES, THEN YOU MAY FIND THAT HE

CAUSED THE MAILS OR INSTRUMENTALITY OF INTERSTATE COMMERCE TO BE USED.

WHEN ONE DOES AN ACT WITH THE KNOWLEDGE THAT THE USE OF INTERSTATE MEANS OF COMMUNICATION WILL FOLLOW IN THE ORDINARY COURSE OF BUSINESS, OR WHERE SUCH USE REASONABLY CAN BE FORESEEN, EVEN THOUGH NOT ACTUALLY INTENDED, THEN HE CAUSES SUCH MEANS TO BE USED.

NOR IS IT NECESSARY THAT THE ITEMS SENT THROUGH THE MAILS OR COMMUNICATED BY TELEPHONE CONTAIN THE FRAUDULENT MATERIAL, OR ANYTHING CRIMINAL OR OBJECTIONABLE. THE MATTER MAILED OR COMMUNICATED BY TELEPHONE MAY BE ENTIRELY INNOCENT.

THE USE OF TELEPHONES OR THE MAIL NEED NOT BE CENTRAL TO THE EXECUTION OF THE SCHEME, AND MAY EVEN BE INCIDENTAL TO IT. ALL THAT IS

REQUIRED IS THAT THE USE OF TELEPHONES OR THE MAIL BEAR SOME RELATION TO THE OBJECT OF THE SCHEME OR FRAUDULENT CONDUCT.

IN FACT, THE ACTUAL OFFER OR SALE NEED NOT BE ACCOMPANIED OR ACCOMPLISHED BY THE USE OF TELEPHONES OR THE MAIL, SO LONG AS THE DEFENDANT IS STILL ENGAGED IN ACTIONS THAT ARE A PART OF A FRAUDULENT SCHEME.

EACH SPECIFIC USE OF A TELEPHONE OR THE MAIL IN FURTHERANCE OF THE SCHEME TO DEFRAUD CONSTITUTES A SEPARATE AND DISTINCT CRIMINAL OFFENSE

ELEMENTS OF CONSPIRACY REVIEWED

I HAVE ALREADY INSTRUCTED YOU ON CONSPIRACY GENERALLY. THOSE SAME INSTRUCTIONS APPLY TO COUNT ONE. AS A REMINDER, THE GOVERNMENT NEED NOT PROVE THAT A DEFENDANT ACTUALLY COMMITTED THE UNLAWFUL ACTS CHARGED AS THE OBJECTS OF THE CONSPIRACY IN COUNT ONE, THAT IS, SECURITIES FRAUD. RATHER, THE GOVERNMENT MUST PROVE, BEYOND A REASONABLE DOUBT, THE FOLLOWING:

FIRST, THAT TWO OR MORE PERSONS ENTERED INTO AN AGREEMENT TO COMMIT SECURITIES FRAUD; AND

SECOND, THAT A DEFENDANT KNOWINGLY AND INTENTIONALLY BECAME A MEMBER OF THE CONSPIRACY.

THERE ARE TWO ADDITIONAL ELEMENTS THAT THE GOVERNMENT MUST PROVE BEYOND A REASONABLE DOUBT IN ORDER TO ESTABLISH THAT A DEFENDANT IS GUILTY OF THE CONSPIRACY ALLEGED IN COUNT ONE.

THE FIRST ADDITIONAL ELEMENT THE GOVERNMENT MUST PROVE IS THAT ONE OF THE MEMBERS OF THE CONSPIRACY KNOWINGLY COMMITTED AT LEAST ONE OF THE OVERT ACTS CHARGED IN THE INDICTMENT.

THE INDICTMENT ALLEGES:

IN FURTHERANCE OF THE CONSPIRACY AND TO EFFECT ITS OBJECTS, WITHIN THE EASTERN DISTRICT OF NEW YORK AND

ELSEWHERE, THE DEFENDANTS, TOGETHER WITH OTHERS, COMMITTED AND CAUSED TO BE COMMITTED, AMONG OTHERS, THE FOLLOWING:

OVERT ACTS

A. ON OR ABOUT JUNE 4, 2013, SHAPIRO SENT AN E-MAIL TO JOHN DOE 3, A REPRESENTATIVE OF RAMAPO COLLEGE OF NEW JERSEY WHOSE IDENTITY IS KNOWN TO THE GRAND JURY, COPYING TWO OF SHAPIRO'S COLLEAGUES, WHOSE IDENTITIES ARE KNOWN TO THE GRAND JURY, AND STATED, IN PART, "MY APOLOGIES ON

BEHALF OF CODESMART. WE DID NOT KNOW ABOUT THAT LANGUAGE YOU [SIC] WERE ALLOWED TO USE AND CERTAINLY WILL CONSULT WITH YOU NEXT TIME WE DO A PROMOTION. THIS IS ALL DONE IN A SPIRIT OF PROMOTING BUSINESS OPPORTUNITIES FOR YOU AS A PARTNER."

B. ON OR ABOUT AUGUST 15, 2013, DISCALA SIGNED A PURCHASE AGREEMENT ON BEHALF OF FIDELIS WHEREBY HE SOLD 25,000 SHARES OF CODESMART COMMON STOCK TO VICTIM 1, AN INDIVIDUAL WHOSE

IDENTITY IS KNOWN TO THE GRAND JURY, FOR $3,500 AT A PURCHASE PRICE OF $0.14 PER SHARE.

C. ON OR ABOUT AUGUST 27, 2013, SHAPIRO FILED WITH THE SEC A FORM 8-K ON BEHALF OF CODESMART AND STATED THAT HE HAD PURCHASED 25,000 SHARES OF THE COMPANY'S STOCK FROM THE PUBLIC MARKET AT THE MARKET VALUE OF $3.21 PER SHARE FOR A COST OF $80,250.

D. ON OR ABOUT OCTOBER 17, 2013, OFSINK CAUSED AN E-MAIL TO BE SENT TO SHAPIRO, WHICH E-MAIL

ATTACHED A SHAM CONSULTING AGREEMENT, A CODESMART BOARD CONSENT FORM APPROVING THE CONSULTING AGREEMENT IN EXCHANGE FOR 750,000 SHARES, AND AN INSTRUCTION LETTER TO TRANSFER 750,000 SHARES OF CODESMART TO A SHELL COMPANY.

E. ON OR ABOUT MAY 6, 2014, DURING A TELEPHONE CALL BETWEEN DISCALA AND GOODRICH DISCUSSING THE TRADING OF CUBED SHARES, DISCALA INQUIRED, IN PART, "CAN YOU GET [YOUR TRADER] OFF THAT 451?

HE'S KILLING THE BOX," ADDING, "IT'S 526, HE'S IN THE MIDDLE OF THE 5'S AT 451[.]" AND GOODRICH RESPONDED, IN PART, "WHERE DO YOU WANT HIM? I'LL CALL HIM RIGHT NOW."

F. ON OR ABOUT MAY 12, 2014, DURING A TELEPHONE CALL BETWEEN DISCALA AND CO-CONSPIRATOR 2, CO-CONSPIRATOR 2 STATED, IN PART, "WE SHOULD START SENDING [JOSEPHBERG] MORONS BY THE WAY. WE COULD TRADE FOR FREE, YOU KNOW, SEND HIM A MORON, YOU KNOW, A GUY YOU DON'T KNOW AND

THEN WE'LL JUST BUY STOCKS AND IF THEY DON'T GO UP BY THE END, WE'LL BUY, LIKE, OPTIONS – TWITTER OPTIONS – THAT EXPIRE IN, LIKE, A DAY. EITHER WE'LL MAKE LIKE TWENTY TIMES OR WE'LL JUST GIVE HIM THE STOCK."

G. ON OR ABOUT MAY 17, 2014, DURING A TELEPHONE CALL BETWEEN DISCALA AND CO-CONSPIRATOR 3, DISCALA STATED, IN PART, "SO OUR DEAL IS GOING TO PAY THE CUBE TWO-FIFTY, CAUSE THESE GUYS CAN'T

GENERATE REVENUE, SO I'M GOING TO GENERATE IT MYSELF."

H. ON OR ABOUT MAY 20, 2014, DURING A TELEPHONE CALL BETWEEN DISCALA AND GOODRICH ABOUT THE ESCROW ACCOUNT AND CUBED TRADING, GOODRICH STATED, IN PART, "[Y]OU DID A PERFECT JOB. HEARING IT OUT OF [CANE'S] MOUTH, THAT MAKES SENSE."

I. ON OR ABOUT MAY 20, 2014, DURING A TELEPHONE CALL BETWEEN DISCALA AND CO-CONSPIRATOR 2, DISCALA STATED, IN PART, "RIGHT,

BECAUSE I'M THE [EXPLETIVE] BRAKE AND THE GAS, [EXPLETIVE]. IF I TAKE MY FOOT OFF THE BRAKE IT'S 55 [DOLLARS] TOMORROW (LAUGHTER)."

J. ON OR ABOUT MAY 21, 2014, DURING A TELEPHONE CALL BETWEEN DISCALA AND CANE, CANE STATED, IN PART, "YOU KNOW [THE INVESTOR RELATIONS/PUBLIC RELATIONS GUYS ARE] GOING TO BE DOING IT AND I ALSO JUST TALKED TO TWO PEOPLE THAT ARE GONNA PROBABLY GOING TO PUT IN ANOTHER HALF A MILLION

INTO CUBED FOR SOME INTERIM,

INTERIM MONEY."

K. ON OR ABOUT MAY 22, 2014,

DURING A TELEPHONE CALL BETWEEN

DISCALA AND JOSEPHBERG,

JOSEPHBERG STATED IN PART, "I DON'T

WANT TO BE THE ONLY ONE BUYING

TODAY. I HEARD IT LOOKS VERY BAD

FOR A BROKER TO BE THE ONLY ONE

BUYING, THAT'S WHAT I HEARD."

L. ON OR ABOUT MAY 27, 2014,

DURING A TELEPHONE CALL BETWEEN

DISCALA AND CANE, CANE STATED, IN

PART, "WELL, IT'S UM, IT'S GONNA

START HAPPENING . . . I DON'T KNOW IF THE PRESS HAS EVEN COME OUT YET. THERE'S GONNA BE A RELEASE TODAY . . . ON THE . . . ACQUISITION . . . WE'RE HAVING A CONFERENCE CALL IN ABOUT 30 MINUTES WITH THE FIRST PR THAT'S GONNA GO OUT – THE PR GROUP."

M. ON OR ABOUT MAY 29, 2014, DURING A TELEPHONE CALL BETWEEN DISCALA AND GOODRICH, DISCALA STATED, IN PART, "NO, JUST BUY 100 AND STAY UNDER 43. I'LL HAVE THE OTHER GUYS MOVE UP."

N. ON OR ABOUT JUNE 6, 2014, DURING A TELEPHONE CALL BETWEEN DISCALA AND CO-CONSPIRATOR 3, CO-CONSPIRATOR 3 STATED, IN PART, "WE DON'T NEED TO GO UP EVERY [EXPLETIVE] DAY, BUT THE BOTTOM LINE IS, YOU KNOW, WE'RE [EXPLETIVE] SUPPORTING THE STOCK[.]"

IN ORDER FOR THE GOVERNMENT TO SATISFY THIS ELEMENT, IT IS NOT REQUIRED THAT ALL OF THE OVERT ACTS ALLEGED IN THE INDICTMENT BE PROVEN OR THAT THE OVERT ACT WAS COMMITTED AT PRECISELY THE TIME ALLEGED IN THE INDICTMENT. IT IS SUFFICIENT IF YOU ARE CONVINCED BEYOND A REASONABLE DOUBT THAT IT OCCURRED AT OR ABOUT

THE TIME AND PLACE STATED. SIMILARLY, YOU NEED NOT FIND THAT EITHER DEFENDANT HIMSELF OR HERSELF COMMITTED THE OVERT ACT. IT IS SUFFICIENT FOR THE GOVERNMENT TO SHOW THAT ONE OF THE CONSPIRATORS KNOWINGLY COMMITTED AN OVERT ACT IN FURTHERANCE OF THE CONSPIRACY, SINCE, IN THE EYES OF THE LAW, SUCH AN ACT BECOMES THE ACT OF ALL OF THE MEMBERS OF THE CONSPIRACY.

THE SECOND ADDITIONAL ELEMENT THE GOVERNMENT MUST PROVE BEYOND A REASONABLE DOUBT IS THAT THE OVERT ACT OR ACTS YOU FIND WERE COMMITTED, WERE DONE SPECIFICALLY TO FURTHER SOME OBJECTIVE OF THE CONSPIRACY.

IN ORDER FOR THE GOVERNMENT TO SATISFY THIS ELEMENT, IT MUST PROVE, BEYOND A REASONABLE DOUBT, THAT AT LEAST ONE OVERT ACT WAS KNOWINGLY AND WILLFULLY DONE, BY AT LEAST ONE CONSPIRATOR, IN FURTHERANCE OF SOME OBJECT OR PURPOSE OF THE CONSPIRACY AS CHARGED IN THE INDICTMENT. IN THIS REGARD, YOU SHOULD BEAR IN MIND THAT THE OVERT ACT, STANDING ALONE, MAY BE AN INNOCENT, LAWFUL ACT. FREQUENTLY, HOWEVER, AN APPARENTLY INNOCENT ACT SHEDS ITS HARMLESS CHARACTER IF IT IS A STEP IN CARRYING OUT, PROMOTING, AIDING OR ASSISTING THE CONSPIRATORIAL SCHEME. THEREFORE, YOU ARE INSTRUCTED THAT THE OVERT ACT DOES NOT HAVE TO

BE AN ACT WHICH, IN AND OF ITSELF, IS CRIMINAL OR CONSTITUTES AN OBJECTIVE OF THE CONSPIRACY.

IN SUM, IN ORDER TO PROVE THAT EITHER DEFENDANT IS GUILTY OF COUNT ONE, THE GOVERNMENT MUST PROVE, BEYOND A REASONABLE DOUBT: 1) THAT THE PURPOSE OF THE CONSPIRACY WAS TO COMMIT SECURITIES FRAUD; 2) THAT THAT DEFENDANT KNOWINGLY AND INTENTIONALLY JOINED THE CONSPIRACY; 3) THAT AT LEAST ONE OF THE OVERT ACTS ALLEGED IN THE INDICTMENT WAS COMMITTED BY AT LEAST ONE MEMBER OF THE CONSPIRACY; AND 4) THAT THE OVERT ACT WAS COMMITTED SPECIFICALLY TO FURTHER SOME OBJECTIVE OF THE CONSPIRACY.

VENUE – CONSPIRACY TO COMMIT SECURITIES FRAUD

I HAVE EXPLAINED TO YOU THE ELEMENTS THE GOVERNMENT MUST PROVE BEYOND A REASONABLE DOUBT AS TO COUNT ONE. THE GOVERNMENT MUST ALSO PROVE VENUE. AS I EXPLAINED TO YOU EARLIER, THE GOVERNMENT MUST PROVE VENUE ONLY BY A PREPONDERANCE OF THE EVIDENCE. I REMIND YOU THAT TO ESTABLISH A FACT BY A PREPONDERANCE OF THE EVIDENCE MEANS TO PROVE THAT THE FACT IS MORE LIKELY TRUE THAN NOT.

TO ESTABLISH VENUE FOR A CONSPIRACY TO COMMIT SECURITIES FRAUD AS CHARGED IN COUNT ONE, THE GOVERNMENT MUST PROVE THAT IT IS MORE LIKELY THAN NOT THAT AN OVERT ACT IN

FURTHERANCE OF THE CONSPIRACY WAS COMMITTED IN THE EASTERN DISTRICT OF NEW YORK. THE OVERT ACT DOES NOT HAVE TO BE AN OVERT ACT THAT IS CHARGED IN THE INDICTMENT IN FURTHERANCE OF THE CONSPIRACY. IN THIS REGARD, THE GOVERNMENT NEED NOT PROVE THAT THE CRIME CHARGED WAS COMMITTED IN THE EASTERN DISTRICT OF NEW YORK OR THAT THE DEFENDANT OR ANY ALLEGED CO-CONSPIRATOR WAS EVEN PHYSICALLY PRESENT HERE. IT IS SUFFICIENT TO SATISFY THE VENUE REQUIREMENT IF AN OVERT ACT IN FURTHERANCE OF THE CONSPIRACY OCCURRED IN WITHIN THE EASTERN DISTRICT OF NEW YORK. THIS INCLUDES NOT JUST ACTS BY THE DEFENDANTS OR THEIR CO-CONSPIRATORS, BUT ALSO

ACTS THAT THE CONSPIRATORS CAUSED OTHERS TO TAKE THAT MATERIALLY FURTHERED THE ENDS OF THE CONSPIRACY.

THEREFORE, IF YOU FIND THAT IT IS MORE LIKELY THAN NOT THAT AN OVERT ACT IN FURTHERANCE OF THE CONSPIRACY TOOK PLACE IN THE EASTERN DISTRICT OF NEW YORK, THE GOVERNMENT HAS SATISFIED ITS BURDEN OF PROOF AS TO VENUE AS TO COUNT ONE. AGAIN, I CAUTION YOU THAT THE PREPONDERANCE OF THE EVIDENCE STANDARD APPLIES ONLY TO VENUE. THE GOVERNMENT MUST PROVE EACH OF THE ELEMENTS OF ALL THE COUNTS BEYOND A REASONABLE DOUBT.

IN SUM, IF YOU FIND THAT THE GOVERNMENT HAS FAILED TO PROVE ANY ONE OF THE ELEMENTS FOR COUNT ONE AS TO EITHER DEFENDANT, BEYOND A REASONABLE DOUBT, THEN YOU MUST FIND THAT DEFENDANT NOT GUILTY OF SECURITIES FRAUD CONSPIRACY FOR COUNT ONE. TO FIND THE DEFENDANT GUILTY OF CONSPIRING TO COMMIT SECURITIES FRAUD AS CHARGED IN COUNT ONE, YOU MUST FIND THAT THE GOVERNMENT HAS PROVEN, BEYOND A REASONABLE DOUBT, EACH ELEMENT OF THE CONSPIRACY TO COMMIT SECURITIES FRAUD, AND THAT THE GOVERNMENT HAS ALSO ESTABLISHED VENUE FOR THE COUNT BY A PREPONDERANCE OF THE EVIDENCE.

COUNT THREE – SECURITIES FRAUD (CODESMART)

COUNT THREE CHARGES ABRAXAS DISCALA WITH SECURITIES FRAUD IN CONNECTION WITH THE SECURITY CODESMART.

THAT CHARGE READS:

IN OR ABOUT AND BETWEEN OCTOBER 2012 AND JULY 2014, BOTH DATES BEING APPROXIMATE AND INCLUSIVE, WITHIN THE EASTERN DISTRICT OF NEW YORK AND ELSEWHERE, THE DEFENDANT ABRAXAS J. DISCALA, TOGETHER WITH OTHERS, DID KNOWINGLY AND WILLFULLY USE AND EMPLOY ONE OR

MORE MANIPULATIVE AND DECEPTIVE DEVICES AND CONTRIVANCES, CONTRARY TO RULE 10B-5 OF THE RULES AND REGULATIONS OF THE UNITED STATES SECURITIES AND EXCHANGE COMMISSION, TITLE 17, CODE OF FEDERAL REGULATIONS, SECTION 240.10B-5, BY (A) EMPLOYING ONE OR MORE DEVICES, SCHEMES AND ARTIFICES TO DEFRAUD; (B) MAKING ONE OR MORE UNTRUE STATEMENTS OF MATERIAL FACT AND OMITTING TO STATE ONE OR MORE MATERIAL FACTS NECESSARY IN ORDER TO MAKE THE

STATEMENTS MADE, IN LIGHT OF THE CIRCUMSTANCES UNDER WHICH THEY WERE MADE, NOT MISLEADING; AND (C) ENGAGING IN ONE OR MORE ACTS, PRACTICES AND COURSES OF BUSINESS WHICH WOULD AND DID OPERATE AS A FRAUD AND DECEIT UPON ONE OR MORE INVESTORS OR POTENTIAL INVESTORS IN CODESMART, IN CONNECTION WITH THE PURCHASES AND SALES INVESTMENTS IN CODESMART, DIRECTLY AND INDIRECTLY, BY USE OF MEANS AND INSTRUMENTALITIES OF INTERSTATE

COMMERCE AND THE MAILS,

CONTRARY TO TITLE 15, UNITED

STATES CODE, SECTIONS 78J(B) AND

78FF, TITLE 18, UNITED STATES CODE,

SECTIONS 2 AND 3551.

I HAVE ALREADY PROVIDED YOU WITH THE ELEMENTS OF SECURITIES FRAUD AND YOU SHOULD APPLY THOSE ELEMENTS HERE. TO SUMMARIZE, SECURITIES FRAUD HAS THE FOLLOWING ELEMENTS:

FIRST, THAT IN CONNECTION WITH THE PURCHASE OR SALE OF A SECURITY, SPECIFICALLY CODESMART IN THE CASE OF COUNT THREE, THE DEFENDANT DID ANY ONE OR MORE OF THE FOLLOWING:

(1) EMPLOYED A DEVICE, SCHEME OR ARTIFICE TO DEFRAUD, OR

(2) MADE AN UNTRUE STATEMENT OF A MATERIAL FACT OR OMITTED TO STATE A MATERIAL FACT WHICH MADE WHAT WAS SAID, UNDER THE CIRCUMSTANCES, MISLEADING, OR

(3) ENGAGED IN AN ACT, PRACTICE OR COURSE OF BUSINESS THAT OPERATED, OR WOULD OPERATE, AS A FRAUD OR DECEIT UPON A PURCHASER OR SELLER.

SECOND, THAT THE DEFENDANT ACTED WILLFULLY, KNOWINGLY AND WITH THE INTENT TO DEFRAUD.

THIRD, THAT THE DEFENDANT KNOWINGLY USED, OR CAUSED TO BE USED, ANY MEANS OR INSTRUMENTS

OF TRANSPORTATION OR COMMUNICATION IN INTERSTATE COMMERCE OR THE USE OF THE MAILS IN FURTHERANCE OF THE FRAUDULENT CONDUCT.

IF YOU FIND THAT THE GOVERNMENT HAS NOT PROVED EACH OF THOSE THREE ELEMENTS BEYOND A REASONABLE DOUBT WITH RESPECT TO DISCALA'S CONDUCT IN CONNECTION WITH THE SECURITY ITEN, YOU MUST FIND HIM NOT GUILTY.

COUNT FOUR – SECURITIES FRAUD (CUBED)

COUNT FOUR CHARGES ABRAXAS DISCALA AND KYLEEN CANE WITH SECURITIES FRAUD IN CONNECTION WITH THE SECURITY CUBED.

COUNT FOUR READS:

IN OR ABOUT AND BETWEEN MARCH 2014 AND JULY 2014, BOTH DATES BEING APPROXIMATE AND INCLUSIVE, WITHIN THE EASTERN DISTRICT OF NEW YORK AND ELSEWHERE, THE DEFENDANTS ABRAXAS J. DISCALA AND KYLEEN CANE, TOGETHER WITH OTHERS, DID KNOWINGLY AND WILLFULLY USE AND

EMPLOY ONE OR MORE MANIPULATIVE AND DECEPTIVE DEVICES AND CONTRIVANCES, CONTRARY TO RULE 10B-5 OF THE RULES AND REGULATIONS OF THE UNITED STATES SECURITIES AND EXCHANGE COMMISSION, TITLE 17, CODE OF FEDERAL REGULATIONS, SECTION 240.10B-5, BY (A) EMPLOYING ONE OR MORE DEVICES, SCHEMES AND ARTIFICES TO DEFRAUD; (B) MAKING ONE OR MORE UNTRUE STATEMENTS OF MATERIAL FACT AND OMITTING TO STATE ONE OR MORE MATERIAL FACTS NECESSARY IN ORDER TO MAKE THE

STATEMENTS MADE, IN LIGHT OF THE CIRCUMSTANCES UNDER WHICH THEY WERE MADE, NOT MISLEADING; AND (C) ENGAGING IN ONE OR MORE ACTS, PRACTICES AND COURSES OF BUSINESS WHICH WOULD AND DID OPERATE AS A FRAUD AND DECEIT UPON ONE OR MORE INVESTORS OR POTENTIAL INVESTORS IN CUBED, IN CONNECTION WITH THE PURCHASES AND SALES INVESTMENTS IN CUBED, DIRECTLY AND INDIRECTLY, BY USE OF MEANS AND INSTRUMENTALITIES OF INTERSTATE COMMERCE AND THE

MAILS, CONTRARY TO TITLE 15, UNITED STATES CODE, SECTIONS 78J(B) AND 78FF, TITLE 18, UNITED STATES CODE, SECTIONS 2 AND 3551.

YOU SHOULD APPLY THE ELEMENTS OF SECURITIES FRAUD TO THIS CHARGE. TO SUMMARIZE FOR THE FINAL TIME, SECURITIES FRAUD HAS THE FOLLOWING ELEMENTS:

FIRST, THAT IN CONNECTION WITH THE PURCHASE OR SALE OF A SECURITY, SPECIFICALLY CUBED, THE DEFENDANTS DID ANY ONE OR MORE OF THE FOLLOWING:

(1) EMPLOYED A DEVICE, SCHEME OR ARTIFICE TO DEFRAUD, OR

(2) MADE AN UNTRUE STATEMENT OF A MATERIAL FACT OR OMITTED TO STATE A MATERIAL FACT WHICH MADE WHAT WAS SAID, UNDER THE CIRCUMSTANCES, MISLEADING, OR (3) ENGAGED IN AN ACT, PRACTICE OR COURSE OF BUSINESS THAT OPERATED, OR WOULD OPERATE, AS A FRAUD OR DECEIT UPON A PURCHASER OR SELLER.

SECOND, THAT THE DEFENDANTS ACTED WILLFULLY, KNOWINGLY AND WITH THE INTENT TO DEFRAUD.

THIRD, THAT THE DEFENDANTS KNOWINGLY USED, OR CAUSED TO BE USED, ANY MEANS OR INSTRUMENTS OF TRANSPORTATION OR COMMUNICATION IN

INTERSTATE COMMERCE OR THE USE OF THE MAILS IN FURTHERANCE OF THE FRAUDULENT CONDUCT.

IF YOU FIND THAT THE GOVERNMENT HAS NOT PROVED EACH OF THE THREE ELEMENTS OF SECURITIES FRAUD BEYOND A REASONABLE DOUBT WITH RESPECT TO DISCALA'S AND/OR CANE'S CONDUCT IN CONNECTION WITH THE SECURITIES CUBED, YOU MUST FIND HIM AND/OR HER NOT GUILTY.

VENUE – SECURITIES FRAUD

I HAVE EXPLAINED TO YOU THE ELEMENTS THE GOVERNMENT MUST PROVE BEYOND A REASONABLE DOUBT AS TO THE SECURITIES FRAUD CHARGED IN COUNTS THREE AND FOUR. THE GOVERNMENT MUST ALSO PROVE VENUE FOR EACH COUNT. UNLIKE THE ELEMENTS I JUST EXPLAINED TO YOU THAT THE GOVERNMENT MUST PROVE BEYOND A REASONABLE DOUBT, THE GOVERNMENT MUST PROVE VENUE BY A PREPONDERANCE OF THE EVIDENCE. TO ESTABLISH A FACT BY A PREPONDERANCE OF THE EVIDENCE MEANS TO PROVE THAT THE FACT IS MORE LIKELY TRUE THAN NOT. A PREPONDERANCE OF THE EVIDENCE MEANS THE GREATER WEIGHT OF THE EVIDENCE, BOTH DIRECT AND

CIRCUMSTANTIAL. IT REFERS TO THE QUALITY AND PERSUASIVENESS OF THE EVIDENCE, NOT TO THE QUANTITY OF EVIDENCE.

TO ESTABLISH VENUE FOR SECURITIES FRAUD AS CHARGED IN COUNTS THREE AND FOUR, THE GOVERNMENT MUST PROVE THAT IT IS MORE LIKELY THAN NOT THAT (1) THE DEFENDANT INTENTIONALLY AND KNOWINGLY CAUSED AN ACT OR TRANSACTION CONSTITUTING A SECURITIES FRAUD TO OCCUR, AT LEAST IN PART, IN THE EASTERN DISTRICT OF NEW YORK, WHICH CONSISTS OF THE COUNTIES OF KINGS (ALSO KNOWN AS BROOKLYN), QUEENS, RICHMOND (ALSO KNOWN AS STATEN ISLAND), NASSAU, AND SUFFOLK, OR (2) IT WAS FORESEEABLE THAT SUCH AN

ACT OR TRANSACTION WOULD OCCUR IN THE EASTERN DISTRICT OF NEW YORK, AND IT DID. THE GOVERNMENT NEED NOT PROVE THAT THE DEFENDANT PERSONALLY WAS PRESENT IN THE EASTERN DISTRICT OF NEW YORK. IT IS SUFFICIENT TO SATISFY THE VENUE REQUIREMENT IF THE DEFENDANT INTENTIONALLY AND KNOWINGLY CAUSED AN ACT OR TRANSACTION CONSTITUTING A SECURITIES FRAUD TO OCCUR, AT LEAST IN PART, WITHIN THE EASTERN DISTRICT OF NEW YORK.

THE GOVERNMENT ALSO MUST PROVE THAT THE ACT OR TRANSACTION MUST BE A PART OF THE ACTUAL CRIME OF SECURITIES FRAUD AND NOT MERELY A STEP TAKEN IN PREPARATION FOR THE COMMISSION OF THE CRIME.

THEREFORE, IF YOU FIND THAT IT IS MORE LIKELY THAN NOT THAT AN ACT OR TRANSACTION IN FURTHERANCE OF THE SECURITIES FRAUD TOOK PLACE IN THE EASTERN DISTRICT OF NEW YORK, THE GOVERNMENT HAS SATISFIED ITS BURDEN OF PROOF AS TO VENUE AS TO COUNTS THREE AND FOUR.

AGAIN, I CAUTION YOU THAT THE PREPONDERANCE OF THE EVIDENCE STANDARD APPLIES ONLY TO VENUE. THE GOVERNMENT MUST PROVE EACH OF THE ELEMENTS OF SECURITIES FRAUD IN COUNTS THREE AND FOUR BEYOND A REASONABLE DOUBT.

IN SUM, TO FIND A DEFENDANT GUILTY OF SECURITIES FRAUD AS CHARGED IN COUNT THREE AND COUNT FOUR, YOU MUST FIND THAT THE GOVERNMENT

HAS PROVEN, BEYOND A REASONABLE DOUBT, EACH ELEMENT OF SECURITIES FRAUD FOR THAT COUNT, AND THAT THE GOVERNMENT HAS ALSO ESTABLISHED VENUE FOR THAT COUNT BY A PREPONDERANCE OF THE EVIDENCE.

COUNTS FIVE THROUGH TEN - WIRE FRAUD

COUNTS FIVE THROUGH TEN EACH CHARGE WIRE FRAUD. EACH INDIVIDUAL WIRE IN FURTHERANCE OF A FRAUDULENT SCHEME IS A SEPARATE CRIME. COUNTS FIVE THROUGH TEN CHARGE SIX SEPARATE CRIMES RELATING TO SIX SEPARATE USES OF THE WIRES IN FURTHERANCE OF ONE SCHEME.

COUNTS FIVE THROUGH TEN READ:

IN OR ABOUT AND BETWEEN OCTOBER 2012 AND JULY 2014, BOTH DATES BEING APPROXIMATE AND INCLUSIVE, WITHIN THE EASTERN DISTRICT OF NEW YORK AND ELSEWHERE, THE DEFENDANT

ABRAXAS J. DISCALA, TOGETHER WITH OTHERS, DID KNOWINGLY AND INTENTIONALLY DEVISE A SCHEME AND ARTIFICE TO DEFRAUD INVESTORS AND POTENTIAL INVESTORS IN CERTAIN OF THE MANIPULATED PUBLIC COMPANIES, AND TO OBTAIN MONEY AND PROPERTY FROM THEM BY MEANS OF MATERIALLY FALSE AND FRAUDULENT PRETENSES, REPRESENTATIONS AND PROMISES, AND FOR THE PURPOSE OF EXECUTING SUCH SCHEME AND ARTIFICE, THE DEFENDANT ABRAXAS J. DISCALA,

TOGETHER WITH OTHERS, DID TRANSMIT AND CAUSE TO BE TRANSMITTED BY MEANS OF WIRE COMMUNICATION IN INTERSTATE AND FOREIGN COMMERCE, WRITINGS, SIGNS, SIGNALS, PICTURES, AND SOUNDS.

ON OR ABOUT THE DATES SET FORTH BELOW, FOR THE PURPOSE OF EXECUTING SUCH SCHEME AND ARTIFICE, THE DEFENDANT ABRAXAS DISCALA, TOGETHER WITH OTHERS, DID TRANSMIT AND CAUSE TO BE TRANSMITTED, BY MEANS OF WIRE COMMUNICATION IN INTERSTATE AND FOREIGN COMMERCE, WRITINGS, SIGNS, SIGNALS, PICTURES, AND SOUNDS, AS SET FORTH

BELOW:

COUNT	APPROXIMATE DATE	DESCRIPTION OF THE WIRE
FIVE	MAY 9, 2014	TELEPHONE CALL FROM DISCALA TO GOODRICH DISCUSSING, AMONG OTHER THINGS, THE MANIPULATION OF CUBED'S STOCK.
SIX	MAY 9, 2014	TELEPHONE CALL FROM DISCALA TO BROKER 1, AN INDIVIDUAL WHOSE IDENTITY IS KNOWN TO

COUNT	APPROXIMATE DATE	DESCRIPTION OF THE WIRE
		THE GRAND JURY, DISCUSSING, AMONG OTHER THINGS, THE MANIPULATION OF CUBED'S STOCK.
SEVEN	MAY 9, 2014	TELEPHONE CALL FROM DISCALA TO CO-CONSPIRATOR 2 DISCUSSING, AMONG OTHER THINGS, THE MANIPULATION OF

COUNT	APPROXIMATE DATE	DESCRIPTION OF THE WIRE
		CUBED'S AND STARSTREAM'S STOCKS.
EIGHT	JUNE 12, 2014	TELEPHONE CALL FROM DISCALA TO TRADER 1, AN INDIVIDUAL WHOSE IDENTITY IS KNOWN TO THE GRAND JURY, DISCUSSING, AMONG OTHER THINGS, THE MANIPULATION OF STARSTREAM'S STOCK.

COUNT	APPROXIMATE DATE	DESCRIPTION OF THE WIRE
NINE	JUNE 12, 2014	TELEPHONE CALL FROM DISCALA TO JOSEPHBERG DISCUSSING, AMONG OTHER THINGS, THE MANIPULATION OF STARSTREAM'S STOCK.
TEN	JUNE 12, 2014	TELEPHONE CALL FROM DISCALA TO CO-CONSPIRATOR 3 DISCUSSING, AMONG OTHER THINGS, THE

COUNT	APPROXIMATE DATE	DESCRIPTION OF THE WIRE
		MANIPULATION OF CODESMART'S, CUBED'S, AND STARSTREAM'S STOCK.

I HAVE ALREADY DESCRIBED THE ELEMENTS OF WIRE FRAUD. THOSE ELEMENTS APPLY TO THESE CHARGES AS WELL.

NOTABLY, WITH RESPECT TO THE USE OF THE WIRES, THE GOVERNMENT MUST ESTABLISH BEYOND A REASONABLE DOUBT THE PARTICULAR USE CHARGED IN THE INDICTMENT. HOWEVER, THE GOVERNMENT DOES

NOT HAVE TO PROVE THAT THE WIRES WERE USED ON THE EXACT DATE CHARGED IN THE INDICTMENT. IT IS SUFFICIENT IF THE EVIDENCE ESTABLISHES BEYOND A REASONABLE DOUBT THAT THE WIRES WERE USED ON A DATE SUBSTANTIALLY SIMILAR TO THE DATES CHARGED IN THE INDICTMENT.

GOOD FAITH

I HAVE ALREADY GIVEN YOU CERTAIN INSTRUCTIONS REGARDING THE DEFENSE OF GOOD FAITH. I NOW WANT TO IMPRESS UPON YOU THAT GOOD FAITH IS A COMPLETE DEFENSE TO THE CHARGES IN THIS CASE.

AS I HAVE ALREADY TOLD YOU, SOME OF THE CHARGES IN THIS CASE DEAL WITH FALSE STATEMENTS. A STATEMENT MADE WITH GOOD FAITH BELIEF IN ITS ACCURACY DOES NOT AMOUNT TO A FALSE STATEMENT AND IS NOT A CRIME. THIS IS SO EVEN IF THE STATEMENT IS, IN FACT, ERRONEOUS.

OTHER OF THE CHARGES IN THIS CASE DEAL WITH FRAUD. IF A DEFENDANT BELIEVED IN GOOD

FAITH THAT HE OR SHE WAS ACTING PROPERLY, EVEN IF HE WAS MISTAKEN IN THAT BELIEF, AND EVEN IF OTHERS WERE INJURED BY HIS CONDUCT, THERE WOULD BE NO CRIME.

THE BURDEN OF ESTABLISHING LACK OF GOOD FAITH AND CRIMINAL INTENT RESTS ON THE GOVERNMENT. A DEFENDANT IS UNDER NO BURDEN TO PROVE HIS OR HER GOOD FAITH; RATHER, AS I HAVE CHARGED YOU, THE GOVERNMENT MUST PROVE BAD FAITH OR KNOWLEDGE OF FALSITY, AS APPROPRIATE, BEYOND A REASONABLE DOUBT.

FRAUD REQUIRES MORE THAN DECEIT

NOT EVERY DECEITFUL STATEMENT IS A BASIS FOR FRAUD, FOR FRAUD REQUIRES MORE THAN JUST DECEIT. A LIE CAN SUPPORT A FRAUD CONVICTION ONLY IF IT IS MATERIAL – THAT IS, IF IT WOULD AFFECT A REASONABLE PERSON'S EVALUATION OF A PROPOSAL. IN GENERAL, A FALSE STATEMENT IS MATERIAL IF IT HAS A NATURAL TENDENCY TO INFLUENCE, OR IS CAPABLE OF INFLUENCING, THE DECISION OF THE DECISION-MAKER TO WHICH IT WAS ADDRESSED.

IN ADDITION TO BEING MATERIAL, THE DECEIT MUST ALSO BE COUPLED WITH A CONTEMPLATED HARM TO THE VICTIM. IT IS NOT SUFFICIENT THAT THE DEFENDANT REALIZES THAT THE ALLEGED SCHEME IS

FRAUDULENT AND THAT IT HAS THE CAPACITY TO CAUSE HARM TO ITS VICTIMS, BUT, INSTEAD, PROOF MUST DEMONSTRATE THAT THE DEFENDANT HAD CONSCIOUS, KNOWING INTENT TO DEFRAUD AND THAT THE DEFENDANT CONTEMPLATED OR INTENDED SOME HARM TO THE PROPERTY RIGHTS OF THE VICTIM.

USING MOTIVE FOR INTENT

PROOF OF MOTIVE IS NOT A NECESSARY ELEMENT OF THE CRIMES WITH WHICH THE DEFENDANTS ARE CHARGED.

PROOF OF MOTIVE DOES NOT ESTABLISH GUILT, NOR DOES LACK OF MOTIVE ESTABLISH THAT A DEFENDANT IS INNOCENT.

IF THE GUILT OF THE DEFENDANT IS SHOWN BEYOND A REASONABLE DOUBT, IT IS IMMATERIAL WHAT THE MOTIVE FOR THE CRIMES MAY BE, OR WHETHER ANY MOTIVE BE SHOWN, BUT THE PRESENCE OR ABSENCE OF MOTIVE IS A CIRCUMSTANCE WHICH YOU MAY CONSIDER AS BEARING ON THE INTENT OF A DEFENDANT.

III. RULES GOVERNING JURY DELIBERATIONS

INTRO. TO DELIBERATIONS AND SELECTING FOREPERSON

YOU ARE ABOUT TO GO INTO THE JURY ROOM, MEMBERS OF THE JURY, TO BEGIN YOUR DELIBERATIONS. THAT BRINGS US TO THE THIRD AND FINAL PART OF MY CHARGE WHICH PROVIDES SOME GENERAL RULES REGARDING YOUR DELIBERATIONS.

IN ORDER THAT YOUR DELIBERATIONS MAY PROCEED IN AN ORDERLY FASHION, FIRST YOU SHOULD HAVE A FOREPERSON. TRADITIONALLY, JUROR NUMBER ONE ACTS AS FOREPERSON. OF COURSE, HIS OR HER VOTE IS ENTITLED TO NO GREATER WEIGHT THAN THAT OF ANY OTHER JUROR.

DELIBERATIONS

KEEP IN MIND THAT NOTHING I HAVE SAID IN THESE INSTRUCTIONS IS INTENDED TO SUGGEST TO YOU IN ANY WAY WHAT I THINK YOUR VERDICT SHOULD BE. THAT IS ENTIRELY FOR YOU TO DECIDE.

BY WAY OF REMINDER, I CHARGE YOU ONCE AGAIN THAT IT IS YOUR RESPONSIBILITY TO JUDGE THE FACTS IN THIS CASE FROM THE EVIDENCE PRESENTED DURING THE TRIAL AND TO APPLY THE LAW AS I HAVE GIVEN IT TO YOU TO THE FACTS AS YOU FIND THEM FROM THE EVIDENCE.

WHEN YOU RETIRE, IT IS YOUR DUTY TO DISCUSS THE CASE FOR THE PURPOSE OF REACHING AGREEMENT IF YOU CAN DO SO. EACH OF YOU MUST DECIDE THE

CASE FOR YOURSELF, BUT SHOULD ONLY DO SO AFTER CONSIDERING ALL THE EVIDENCE, LISTENING TO THE VIEWS OF YOUR FELLOW JURORS, AND DISCUSSING IT FULLY. IT IS IMPORTANT THAT YOU REACH A VERDICT IF YOU CAN DO SO CONSCIENTIOUSLY. YOU SHOULD NOT HESITATE TO RECONSIDER YOUR OPINIONS FROM TIME TO TIME AND TO CHANGE THEM IF YOU ARE CONVINCED THAT THEY ARE WRONG. HOWEVER, DO NOT SURRENDER AN HONEST CONVICTION AS TO WEIGHT AND EFFECT OF THE EVIDENCE SIMPLY TO ARRIVE AT A VERDICT.

UNANIMOUS VERDICT

ANY VERDICT YOU REACH MUST BE UNANIMOUS.

THAT IS, WITH RESPECT TO EACH COUNT, FOR EACH DEFENDANT, YOU MUST ALL AGREE AS TO WHETHER YOUR VERDICT IS GUILTY OR NOT GUILTY AS TO THAT COUNT.

TIME AND PLACE OF DELIBERATIONS

DELIBERATIONS ARE TO TAKE PLACE ONLY IN THE JURY ROOM. YOU WILL NOT DISCUSS THIS CASE WITH ANYONE OUTSIDE THE JURY ROOM. AND THAT INCLUDES YOUR FELLOW JURORS. YOU WILL ONLY DISCUSS THE CASE WHEN ALL 12 DELIBERATING JURORS ARE TOGETHER, IN THE JURY ROOM, WITH NO ONE ELSE PRESENT, BEHIND THE CLOSED DOOR. AT NO OTHER TIME IS THERE TO BE ANY DISCUSSION ABOUT THE MERITS OF THE CASE. PERIOD.

NO CONSIDERATION OF PUNISHMENT

FINALLY, YOU CANNOT ALLOW A CONSIDERATION OF THE PUNISHMENT WHICH MAY BE IMPOSED UPON A DEFENDANT, IF CONVICTED, TO INFLUENCE YOUR VERDICT IN ANY WAY OR TO ENTER INTO YOUR DELIBERATIONS.

REGARDLESS, THE DUTY OF IMPOSING A SENTENCE RESTS EXCLUSIVELY WITH ME. YOUR DUTY IS TO WEIGH THE EVIDENCE IN THE CASE AND TO DETERMINE WHETHER THE GOVERNMENT HAS PROVEN EVERY ELEMENT BEYOND A REASONABLE DOUBT SOLELY UPON SUCH EVIDENCE AND UPON THE LAW WITHOUT BEING INFLUENCED BY ANY ASSUMPTION, CONJECTURE,

SYMPATHY, OR INFERENCE NOT WARRANTED BY THE FACTS.

NO COMMUNICATIONS RULE

AS I AM SURE YOU CAN IMAGINE, IT IS VERY IMPORTANT THAT YOU NOT COMMUNICATE WITH ANYONE OUTSIDE THE JURY ROOM ABOUT YOUR DELIBERATIONS OR ABOUT ANYTHING TOUCHING THIS CASE. THERE IS ONLY ONE EXCEPTION TO THIS RULE. IF IT BECOMES NECESSARY DURING YOUR DELIBERATIONS TO COMMUNICATE WITH ME, YOU MAY SEND A NOTE, THROUGH THE MARSHAL, SIGNED BY YOUR FOREPERSON OR BY ONE OR MORE MEMBERS OF THE JURY. NO MEMBER OF THE JURY SHOULD EVER ATTEMPT TO COMMUNICATE WITH ME EXCEPT BY A SIGNED WRITING, AND I WILL NEVER COMMUNICATE WITH ANY MEMBER OF THE JURY ON ANY SUBJECT TOUCHING THE MERITS

OF THE CASE OTHER THAN IN WRITING, OR ORALLY HERE IN OPEN COURT. IF YOU SEND ANY NOTES TO THE COURT, DO NOT DISCLOSE ANYTHING ABOUT YOUR DELIBERATIONS. SPECIFICALLY, DO NOT DISCLOSE TO ANYONE— NOT EVEN TO ME— HOW THE JURY STANDS, NUMERICALLY OR OTHERWISE, ON THE QUESTION OF THE GUILT OR INNOCENCE OF THE DEFENDANT, UNTIL AFTER YOU HAVE REACHED A UNANIMOUS VERDICT ON EACH COUNT OR HAVE BEEN DISCHARGED.

JURY RECOLLECTION AND JURY NOTES

KEEP IN MIND TOO THAT IN DELIBERATIONS, THE JURY'S RECOLLECTION GOVERNS, NOBODY ELSE'S. NOT THE COURT'S -- IF I HAVE MADE REFERENCE TO THE TESTIMONY -- AND NOT COUNSEL'S RECOLLECTION. IT IS YOUR RECOLLECTION THAT MUST GOVERN DURING YOUR DELIBERATIONS. IF NECESSARY, DURING THOSE DELIBERATIONS, YOU MAY REQUEST BY JURY NOTE A READING FROM THE TRIAL TRANSCRIPT THAT MAY REFRESH YOUR RECOLLECTION.

PLEASE, AS BEST YOU CAN, TRY TO BE AS SPECIFIC AS POSSIBLE IN YOUR REQUESTS FOR READ BACKS; IN OTHER WORDS, IF YOU ARE INTERESTED ONLY IN A PARTICULAR PART OF A WITNESS'S TESTIMONY, PLEASE

INDICATE THAT TO US. IT MAY TAKE SOME TIME FOR US TO LOCATE THE TESTIMONY IN THE TRANSCRIPTS, SO PLEASE BE PATIENT. AND, AS A GENERAL MATTER, IF THERE IS EVER A DELAY IN RESPONDING TO A JURY NOTE, PLEASE UNDERSTAND THERE IS A REASON FOR IT. NONE OF US GOES ANYWHERE. AS SOON AS A JURY NOTE IS DELIVERED TO THE COURT BY THE MARSHAL, WE TURN OUR ATTENTION TO IT IMMEDIATELY.

IN THE SAME WAY, IF YOU HAVE ANY QUESTIONS ABOUT THE APPLICABLE LAW OR YOU WANT A FURTHER EXPLANATION FROM ME, SEND ME A NOTE. WE WILL PROVIDE A RESPONSE AS SOON AS WE CAN.

COMPLETION OF VERDICT SHEET

I HAVE PROVIDED THE JURY WITH A VERDICT SHEET, WHICH IS SELF-EXPLANATORY. NEEDLESS TO SAY, HOWEVER, IF YOU HAVE ANY QUESTIONS ABOUT THE VERDICT SHEET, DO NOT HESITATE TO SEND THE COURT A NOTE ASKING FOR FURTHER INSTRUCTIONS.

WITH RESPECT TO EACH COUNT, YOU ARE TO RESOLVE INDIVIDUALLY THE ISSUE OF WHETHER THE GOVERNMENT HAS ESTABLISHED BEYOND A REASONABLE DOUBT THE ESSENTIAL ELEMENTS OF THE OFFENSE AS I HAVE DESCRIBED THEM TO YOU. THAT IS, YOU MUST ALL AGREE UNANIMOUSLY AS TO WHETHER YOUR VERDICT IS GUILTY OR NOT GUILTY.

WHEN YOU HAVE REACHED A DECISION, HAVE THE FOREPERSON RECORD THE ANSWERS, SIGN THE VERDICT FORM, AND PUT THE DATE ON IT -- AND NOTIFY THE MARSHAL BY NOTE THAT YOU HAVE REACHED A VERDICT. BRING THE COMPLETED VERDICT SHEET WITH YOU WHEN SUMMONED BY THE COURT.

BIAS

YOU MUST NOT BE INFLUENCED BY SYMPATHY, PREJUDICE, OR PUBLIC OPINION. I REMIND YOU AT THE OUTSET THAT EACH OF YOU HAS UNDERTAKEN A SOLEMN OBLIGATION, A SWORN OBLIGATION, TO DECIDE THIS CASE SOLELY ON THE EVIDENCE. YOU MUST CAREFULLY AND IMPARTIALLY CONSIDER THE EVIDENCE, FOLLOW THE LAW AS I STATE IT, AND REACH A JUST VERDICT, REGARDLESS OF THE CONSEQUENCES.

JUROR'S OATH OF DUTY

AS YOU BEGIN YOUR DELIBERATIONS, REMEMBER YOUR OATH SUMS UP YOUR DUTY – AND THAT IS – WITHOUT FEAR OR FAVOR TO ANY PERSON OR PARTY, YOU WILL WELL AND TRULY TRY THE ISSUES IN THIS CASE ACCORDING TO THE EVIDENCE GIVEN TO YOU IN COURT AND THE LAWS OF THE UNITED STATES.

DISMISSAL OF ALTERNATE JURORS

IN A FEW MINUTES, I AM GOING TO EXCUSE OUR ALTERNATE JURORS. AS I TOLD YOU BEFORE, YOUR SERVICES WERE REQUIRED AS A SAFEGUARD AGAINST THE POSSIBILITY THAT ONE OF THE REGULAR JURORS MIGHT BE UNABLE TO COMPLETE HIS OR HER SERVICE. I COMMEND THE ALTERNATE JURORS FOR THEIR FAITHFUL ATTENDANCE AND ATTENTION. ON BEHALF OF THE COURT AND THE PARTIES, I THANK YOU FOR YOUR SERVICE.

PAUSE FOR EXCEPTIONS TO CHARGE

MEMBERS OF THE JURY, I ASK YOUR PATIENCE FOR A FEW MOMENTS LONGER. IT MAY BE NECESSARY FOR ME TO SPEND A FEW MOMENTS WITH COUNSEL AND THE REPORTER AT THE SIDE BAR. IF SO, I WILL ASK YOU TO REMAIN PATIENTLY IN THE BOX, WITHOUT SPEAKING TO EACH OTHER, AND WE WILL RETURN IN JUST A MOMENT TO SUBMIT THE CASE TO YOU.

THANK YOU AGAIN FOR YOUR TIME AND ATTENTIVENESS.